Applicants, Applicants in the Hall, Who's the Fairest of Them All? Comparing Qualifications Under Employment Discrimination Law

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Prologue

As a general proposition, employment discrimination statutes do not restrict an employer's ability to establish qualifications for employment and job performance.[1] Title VII of the Civil Rights Act of 1964 (Title VII) prohibits distinctions among applicants on the basis of race, color, religion, sex, or national origin.[2] The Age Discrimination in Employment Act (ADEA) prohibits the use of age criteria for employees and applicants between the ages of forty and seventy.[3] The Rehabilitation Act prohibits employment discrimination based on physical or mental handicap.[4] The

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1. Casillas v. United States Navy, 735 F.2d 338, 344 (9th Cir. 1984) ("Title VII is not a civil code of employment criteria and it 'was not intended to diminish traditional management prerogatives.'"); *accord* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); EEOC v. Federal Reserve Bank, 698 F.2d 633, 671 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Lee v. Conecuh County Bd. of Educ., 634 F.2d 959, 963 (5th Cir. 1981).

2. 42 U.S.C. §§ 2000e–2000e–17 (1982). The provision relevant to this discussion provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e–2(a).

3. 29 U.S.C. §§ 621–34 (1982). The ADEA adopts language from Title VII and inserts the word "age" where relevant. *See id.* § 623. However, the Act later limits its protection to persons who are at least age 40 but less than age 70. *Id.* § 631(a). To the extent the two statutes share common language and a common purpose, Title VII and the ADEA will be similarly interpreted. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979); Lorillard v. Pons, 434 U.S. 575, 584 (1978). *See generally* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (1981).

4. 29 U.S.C. §§ 701–96 (1982). The Rehabilitation Act has a more narrow coverage than either Title VII or the ADEA. Only federal employers, *id.* §§ 701, 704, employers who receive federal financial assistance, *id.* § 704, and employers who operate under federal procurement contracts, *id.* § 703, are subject to the Rehabilitation Act. *See* Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1253 (1984). Private judicial enforcement of the statute is available only for federal employees and employees whose employers receive federal financial assistance. *See* Presinzano v. Hoffman-LaRoche, Inc., 726 F.2d 105 (3d Cir. 1984); Howard v. Uniroyal, Inc., 719 F.2d 1552 (11th Cir. 1983); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

The Rehabilitation Act also contains substantive language that differs from Title VII and the ADEA. A plaintiff must establish that he or she is a "qualified handicapped individual," 29 U.S.C. §§ 503, 504 (1982), and that the discrimination was "solely by reason of his handicap." *Id.* § 504. *See* Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979). Nonetheless, in interpreting the Rehabilitation Act's prohibitions against handicap discrimination, the courts have utilized an analysis similar to that which has evolved from Title VII and ADEA litigation. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985). *See* Strathie v. Department of Transp., 716 F.2d 227 (3d Cir. 1983); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983); Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983); Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981); *See generally* Peck, *Employment Problems of the Handicapped: Would Title VII Remedies be Appropriate and Effective*, 16 MICH. J.L. REF. 343 (1983).

express use of such classifications is justified only if the employer proves that the proscribed classification is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business."[5]

Employment decisions not expressly based on statutorily proscribed criteria can be challenged at two levels. First, a plaintiff may challenge the legality of the criteria directly. The employer is free to establish and utilize any job selection or retention criteria which are facially neutral in terms of motivation, and which do not have an adverse impact on persons within a class protected by the statutes. Thus, if the criteria are not expressly drawn along proscribed lines, the plaintiff must show that the devices the employer utilized to exclude the plaintiff either were established by the employer who was motivated to exclude the plaintiff based on one or more of the statutorily proscribed criteria, or adversely affected a class protected by these statutes.[6] If use of the criteria were legally motivated, only proof of the criteria's adverse impact on a protected class obligates the defendant to establish that the criteria are necessary for a safe and efficient business operation.[7]

Second, a plaintiff may challenge employment decisions that were not expressly based on statutorily proscribed criteria by proving that a particular employment decision was motivated by factors made illegal by the statutes. This challenge usually presupposes that the articulated criteria for the selection are themselves neutral. The plaintiff's stance, however, urges that the decision was motivated not by the articulated neutral criteria, but by factors made illegal by the employment discrimination statutes.[8]

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5. Title VII, 42 U.S.C. § 2000e-2(e) (1982); ADEA, 29 U.S.C. § 623(f)(1) (1982); *see* Dothard v. Rawlinson, 433 U.S. 321, 333–34 (1977); Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983); Hardin v. Stynchcomb, 691 F.2d 1364, 1370 (11th Cir. 1982); 29 C.F.R. § 1604.2 (1983).

Although the bona fide occupational qualification (BFOQ) defense does not apply to racial distinction, an employer who establishes the "necessity" of any express racial distinction will not violate Title VII. *See* Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652–53 (5th Cir.), *cert. denied*, 449 U.S. 891 (1980); see also Steelworkers of Am. v. Weber, 443 U.S. 193 (1979), in which the court permitted the employer to distinguish employees on the basis of race as part of a voluntary affirmative action program designed to remedy past patterns of racial imbalance.

The Rehabilitation Act does not have an expressed bona fide occupational qualification defense. However, a plaintiff must prove that even with the handicap he or she is qualified to perform the job. This burden reaches roughly the same result as in Title VII and ADEA cases. The major analytical difference may be that the plaintiff probably will be required to carry a heavier burden than would a plaintiff under Title VII or the ADEA. *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

6. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977). The Court states:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some instances be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII . . . .
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> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

7. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

8. An inference of improper motivation can be created by direct evidence of class-based animus. *See, e.g.*, Goodwin v. Circuit Court, 729 F.2d 541, 546 (8th Cir. 1984) (oral statement that "Court will never run well so long as there are women in charge."); Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983) (oral statement encouraging managers to "hire younger people for less money"); Nation v. Bank of Cal., 649 F.2d 691, 698 (9th Cir. 1981) (comment that plaintiff was "over the hill"); Laugesen v. Anaconda Co., 510 F.2d 307, 310–11 (6th Cir. 1975) (separation notice

In individual employment decisions, in which the employer's motive is the predominant issue, the employer often asserts a reason for its decision that by its nature compares the qualities, credentials, and qualifications of the plaintiff to those of the person preferred by the employer. Even when the employer does not express a comparative evaluation of the qualities of the applicants, the plaintiff may compare his or her qualities with those possessed by the person who was favored by the employer. This article explores the proper legal analysis for such comparisons and demonstrates that different types of comparative evidence warrant different standards of analysis.

I. QUALIFICATIONS VS. COMPARISONS—IMPACT VS. MOTIVE

Two methods exist by which the individual may challenge his or her rejection based on a purported failure to meet the employer's established job "qualifications." First, and most obvious, a plaintiff can attempt to prove that the qualifications themselves were imposed for the purpose of disadvantaging persons because of their race, sex, national origin, religion, age, or handicap. The plaintiff must carry the burden of persuading the fact finder that the defendant had an illegal motive in establishing the required credentials.[9] Direct documentary evidence or oral admissions of discriminatory motive rarely will be available in these cases. Nonuniform application of the qualification, or its application along race or gender lines, is proof of illegal motivation.[10] However, a uniformly applied, otherwise lawful qualification is virtually immune from attack on the ground that the qualification itself was adopted for unlawful purposes.[11] Even if the plaintiff shows by direct evidence that improper motivation played a role in initially establishing the qualification, the defendant could prevail by proving that the plaintiff would not have been hired or retained even absent the defendant's improper motive.[12]

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stated "too many years in job"); *cf.* Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984); Miles v. M.M.C. Corp., 750 F.2d 867, 874–75 (11th Cir. 1985). Improper motive can be inferred from a statistical demonstration that an employer's practices could not have been the result of a random selection process. Hazelwood School Dist. v. United States, 433 U.S. 299, 307–13 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 336–43 (1977); Castaneda v. Partida, 430 U.S. 482, 494–95 (1977). An inference of illegal motivation also can be created if the plaintiff establishes that a similarly situated person of a different class was treated more favorably than the plaintiff. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284–85 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

Given the common language and common purpose of Title VII and the ADEA, *see supra* note 3, the lower federal courts have applied an analysis developed under Title VII for proving improper motive to cases arising under the ADEA. *See* Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on A Title VII Theme*, 17 GA. L. REV. 621 (1983). Similar analysis will be utilized under the Rehabilitation Act. *See* Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

9. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24–25 (1978).

10. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283–84 (1976); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971); Williams v. City of Montgomery, 742 F.2d 586, 588 (11th Cir. 1984); King v. Trans World Airlines, 738 F.2d 255, 258 (8th Cir. 1984).

11. *See, e.g.*, General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (discriminatory animus of union cannot be attributed to employer); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (foreseeable impact on women of preference for veterans does not establish illegal motivation); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (past patterns of racial discrimination and imposition of neutral selection device on effective date of Title VII does not necessarily establish racial motive).

12. International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977); Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984); King v. Trans World Airlines, 738 F.2d 255, 259 (8th Cir. 1984); Lee v.

A threshold qualification is most commonly challenged by proving that the qualification has an adverse impact on a class of persons protected by the statutes, and thus, that the defendant has failed to carry its burden of proving the business necessity of the challenged qualification. Impact analysis does not require the plaintiff to prove illegal motivation.[13] The plaintiff establishes a prima facie case of illegal discrimination by proving that a seemingly neutral device has a demonstrably adverse effect on the class to which the plaintiff belongs when compared to the impact the device has on other racial, ethnic, gender, or age classes.[14] For example, a requirement that all employees must possess a high school diploma will be deemed to have an adverse racial impact if the plaintiff can demonstrate that more white potential applicants possess high school diplomas than do black potential applicants.[15] A physical qualification, such as a height and weight minimum, may be shown statistically to disqualify female applicants at a rate significantly higher than male applicants.[16] If it is shown that one group fails an objective test at a rate higher than other groups, the test will be said to have an adverse impact on the disadvantaged class.[17] A plaintiff can prove that the disqualification of persons who have criminal records has an adverse impact on certain racial or ethnic groups; this contention can be based on a comparison of criminal conviction rates among racial or ethnic groups.[18]

The criterion's adverse impact, standing alone, does not make its use illegal. Once the plaintiff proves the existence of an adverse impact, the burden shifts to the defendant to prove the business necessity of the challenged device.[19] The Supreme Court has failed to define precisely the meaning of the phrase "business necessity." While the mere reasonableness or rationality of the device does not seem adequate to

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Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982); *see also* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (under the National Labor Relations Act, if General Counsel establishes the presence of illegal motive, the burden may be shifted to the employer to prove that the same decision would have been made even in the absence of illegal motivation). *See generally* Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982); Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases under Title VII*, 6 INDUS. REL. L. J. 353 (1984).

13. International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 430–32 (1971); *see also* Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241 (10th Cir. 1984) (individual plaintiff may use impact analysis).

14. Griggs v. Duke Power Co., 401 U.S. 421, 431 (1971); *see also* Connecticut v. Teal, 457 U.S. 440 (1982) (where a non-job related written test barred the promotions of a disproportionate number of black employees); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight standards not shown to be job related disproportionately precluded the hiring of women). Although impact analysis was developed in Title VII litigation, it has been utilized under the ADEA. EEOC v. Borden's, Inc., 724 F.2d 1390, 1394–95 (9th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686, 690–91 (8th Cir. 1983); Allison v. Western Union Tel. Co., 680 F.2d 1318, 1322 (11th Cir. 1982); Geller v. Markham, 635 F.2d 1027, 1034 (2d Cir. 1980). Impact analysis is also used under the Rehabilitation Act. *See* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (apprentice program improperly denied admission to applicant with dyslexia because of low score on a written test); Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981) (disparate impact test applies when plaintiff could perform essential duties despite his or her handicap).

15. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983) (plaintiff alleged that college degree requirement operated to exclude women from a supervisory position).

16. Dothard v. Rawlinson, 433 U.S. 321, 329–30 (1977).

17. Connecticut v. Teal, 457 U.S. 440, 448 (1982) (Title VII); Stutts v. Freeman, 694 F.2d 666, 669 (11th Cir. 1983) (Rehabilitation Act).

18. Green v. Missouri Pac. R.R., 523 F.2d 1290, 1295 (8th Cir. 1975); *cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (a rule prohibiting employment of narcotics users not proved to have had adverse impact on minority employees).

19. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

establish its necessity,[20] the defendant is not required to prove that it could not function without employing the challenged mechanism.[21] For example, when the employer has used objective, pen-and-paper tests that have an adverse impact on a protected class, the Supreme Court has required the defendant to validate statistically a manifest relationship between job performance and test performance.[22] For example, absent proof that physical size had a proven relationship to performing the tasks required of a prison guard, a height and weight requirement for that job that adversely affects women would not be sustained merely because it was rational.[23] Proof of a close factual nexus between the qualification and job performance thus appears to be the crucial element in the concept of "necessity."[24] However, the plaintiff has the right to establish the existence of an alternative selection device that could serve the employer's purposes as well as the alleged discriminatory criterion and produce less discriminatory effects. The existence of an alternative with a less discriminatory impact would prove that the questioned qualification is not necessary.[25]

A different, distinguishable situation is presented when an employer makes an employment decision not on the basis of an absolute, noncomparative qualification in each applicant but by comparing the qualities, credentials, or activities of many persons and making a subjective decision. If the employer based its decision on a comparative evaluation of multiple factors possessed in various degrees by otherwise qualified[26] individuals, the employer's motivation rather than the requirements' impact on a protected class will be the vehicle for analysis.[27]

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20. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

21. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979).

22. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); *see also* Washington v. Davis, 426 U.S. 229 (1976) (the relationship between a test and a training program is shown to exist that is sufficient to validate the test aside from its relationship to on-the-job performance).

23. Dothard v. Rawlinson, 433 U.S. 321, 331–32 (1977).

24. *See, e.g.*, Contreras v. City of Los Angeles, 656 F.2d 1267, 1280 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1260–62 (6th Cir. 1981). *But see* Williams v. Colorado Springs School Dist., 641 F.2d 835, 841–42 (10th Cir. 1981); Burwell v. Eastern Air Lines, 633 F.2d 361, 371 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (suggesting that the qualification must be "essential," and the purpose "compelling").

25. In New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), the court strongly suggested that the presence of a less discriminatory alternative is relevant only to establish that the rule was improperly motivated. "The District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination." *Id.* at 587. In contrast, Dothard v. Rawlinson, 433 U.S. 321 (1977), suggests that the presence of less discriminatory alternatives indicates that the reason lacks "necessity." *Id.* at 329. The current weight of lower court authority appears to analyze the concept of less discriminatory alternatives as part of the necessity concept. *See, e.g.*, Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), and cases cited *supra* note 24.

26. "Qualified" in this context means that each of the applicants possessed employer-established credentials and qualities, and would have been selected had there been no other applicant for the position. *See infra* text accompanying notes 58–69.

27. For example, if the employer imposes an objective test with a minimum passing score and disqualifies from consideration all who fail to achieve that minimum score, the test itself is a "qualification" subject to analysis for its adverse impact on a protected class. Connecticut v. Teal, 457 U.S. 440, 451–52 (1982). If the employer ranks test takers according to their test scores and awards jobs based on the finish-order of test scores, that ranking becomes an inflexible single criterion and is subject to impact analysis. *See* Gilbert v. City of Little Rock, 722 F.2d 1390, 1397–98 (8th Cir. 1983). Even though the employer compares employees in this latter case, that comparison is made on the basis of a single objective element—relative test scores. If the test score is not the determinative element, but is considered in conjunction with other objective or subjective elements, then the test will not undergo impact analysis. *See* Moore v. Southwestern Bell Tel. Co., 593 F.2d 607, 608 (5th Cir. 1979); Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420, 425 (2d Cir. 1975).

A number of courts have held that impact analysis presupposes a single, objective criterion that controls the employment decision. Therefore, hiring or promotion decisions based on a comparison of multiple variable qualities cannot be analyzed in terms of adverse impact.[28] Even if data about the flow of applicants is theoretically acceptable to show that a multifaceted selection system has an adverse impact when applied to the plaintiff's class,[29] such data may be difficult to generate.[30] Generally, therefore, the plaintiff must proceed by proving that the selection from among qualified applicants was tainted by illegal motivation.

II. Motivation Analysis Surveyed

Occasionally a plaintiff may secure direct evidence of improper motivation in the form of a written document or an oral statement.[31] Direct evidence is rare, and it is not required to establish illegal motivation.[32] The Supreme Court has held that, even without direct evidence, illegal motivation may be proved in either of two ways, both of which use evidentiary inferences as a basis for the motive inquiry: first, the plaintiff may rely on statistics; second, the plaintiff may rely on indirect, objective elements.

A. *"Pattern and Practice": A Statistical Approach to Motivation*

A plaintiff may rely on statistics to establish a prima facie case of discrimination by proving a pervasive "pattern or practice" of illegal motivation.[33] The plaintiff

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28. Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 765 (5th Cir.), *cert. denied*, 104 S. Ct. 482 (1983); EEOC v. Federal Reserve Bank, 698 F.2d 633, 638–39 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Mortensen v. Callaway, 672 F.2d 822, 824 (10th Cir. 1982); Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981). *Contra* Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982); *cf.* Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Robinson v. Polaroid Corp., 732 F.2d 1010, 1015 (1st Cir. 1984); Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 481–82 (9th Cir. 1983) (reserving the question).

29. Analysis of the impact of multiple criteria on a potential "applicant pool" would be difficult, if not impossible. However, there is no theoretical reason that prohibits a relatively fixed system of variables from being analyzed in terms of its "applicant flow" effect. The percentage of actual applicants in the plaintiff's racial or gender class who are selected would be compared with the percentage of applicants from nonminority classes who are selected. If the applicant flow data shows a selection rate for members of the plaintiff's class that is less than 80% of the selection rate for persons of the nonminority class, the *system* of selection, albeit subjective, arguably has an adverse impact on the plaintiff's class. *See* Uniform Guidelines on Employee Selection Procedures (1978), as adopted by the Equal Employment Commission, 29 C.F.R. §§ 16–7.4(D) (1983); *see also* Hawkins v. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 93 (6th Cir. 1982).

30. A court will not assume impact; it must be proved. EEOC v. Kimbrough Inv. Co., 703 F.2d 98, 101 (5th Cir. 1983); Harper v. Trans World Airlines, 525 F.2d 409, 411 (8th Cir. 1975). Data used to reveal the impact of the selection process on actual applicants must rest on a statistically significant sample. Statistical conclusions based on data from a small universe will be rejected as inconclusive. *See* Contreras v. City of Los Angeles, 656 F.2d 1267, 1272–73 (9th Cir. 1981), *cert. denied*, 445 U.S. 1021 (1982) (Five of seventeen Hispanics passed the test, while twenty-two of forty Anglos passed. This was not a large enough sample to make the passage rates of Hispanics and Anglos statistically significant.); *accord* Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975 (7th Cir. 1984); Massarsky v. General Motors Corp., 706 F.2d 111, 120–21 (3d Cir.), *cert. denied*, 104 S. Ct. 348 (1983); Soria v. Ozinga Bros., 704 F.2d 990, 995 (7th Cir. 1983); Robinson v. City of Dallas, 514 F.2d 1271, 1274 (5th Cir. 1975). Furthermore, applicant flow data may be less reliable if employment decisions are made by many persons applying diverse criteria. *See* Coser v. Moore, 739 F.2d 746, 749 (2d Cir. 1984); Craik v. Minnesota State Univ., 731 F.2d 465, 474 (8th Cir. 1984).

31. *See supra* note 8.

32. United States Postal Serv. v. Aikens, 460 U.S. 711, 715–17 (1983).

33. Hazelwood School Dist. v. United States, 433 U.S. 279 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Mozee v. Jeffboat, 746 F.2d 365, 372 (7th Cir. 1984); Walls v. Mississippi State Dep't of Public Welfare, 730 F.2d 306, 322 (5th Cir. 1984); Lilly v. Harris-Teeter Super Markets 720 F.2d 326, 336 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984).

must initially present mathematically reliable statistics that compare the percentage of persons in the job category sought by plaintiff by ethnic, gender, or age class with the percentage of qualified persons of that ethnic, gender, or age class in the geographical area from which the defendant would be expected to draw employees for the position. If the statistical disparity between the percentage of women or minorities employed in a particular job and the percentage of that class in the applicant pool is significant,[34] the burden shifts to the defendant either to discredit the plaintiff's statistical evidence or provide a nondiscriminatory explanation for the result.[35]

Typically, a defendant can refute the plaintiff's statistical analysis by demonstrating that the position required certain qualifications that members of plaintiff's class might not possess.[36] If the defendant cannot refute the plaintiff's statistical demonstration, the plaintiff has succeeded in proving a pattern of illegally motivated decisionmaking. At this point, the plaintiff prevails unless the defendant carries its burden of proving that the individual plaintiff would not have been selected for any vacant position.[37] The defendant may legitimately advance that another applicant was selected for the position because he or she was more qualified than the plaintiff. Impliedly, of course, a comparison ultimately served as the basis for the selection. If the defendant convinces the fact finder that the plaintiff was not as qualfied as the person who received the job,[38] then the defendant presumably is entitled to a favorable judgment.

A similar statistical analysis can be used in an individual claim of discriminatory treatment. However, the individual plaintiff cannot rely solely on statistics to establish illegal discriminatory treatment. The plaintiff must isolate a particular discriminatory action by the employer and provide some direct or inferential evidence, unrelated to the statistics, of the defendant's improper motivation.[39]

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34. A result is deemed statistically significant if the disparity between the observed percentage and the expected percentage could not arise by chance. The statistics must be analyzed mathematically to eliminate chance as an explanation for the imbalance in the work force as compared to the relevant population area. Hazelwood School Dist. v. United States, 433 U.S. 299, 307–13 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 337–43 (1977); Boykin v. Georgia-Pac. Corp., 706 F.2d 1384, 1391 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 999 (1984); EEOC v. Federal Reserve Bank, 698 F.2d 633, 650 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); Gay v. Waiters' and Dairy Lunchmen's Union Local No. 30, 694 F.2d 531, 550–52 (9th Cir. 1982); *see also* Castaneda v. Partida, 430 U.S. 482 (1977), (the plaintiff employed statistical analysis to establish illegal motivation); *cf.* Allen v. Prince George's County, 737 F.2d 1299, 1304 (4th Cir. 1984) (the court questioned the assumption that a work force hired in a nondiscriminatory manner mirrors the population).

35. *See supra* note 34 and cases cited therein. Lilly v. Harris-Teeter Super Markets, 720 F.2d 326, 336 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 816–24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982). The defendant may challenge the validity of the plaintiff's statistical assumption by proving either that the numbers involved were not statistically significant, Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800–01 n.8 (5th Cir. 1982), or that the plaintiff's data as to the geographical area from which employees would likely be drawn were unrealistic. *See, e.g.*, Markey v. Tenneco Oil Co., 707 F.2d 172, 174 (5th Cir. 1983); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 926–29 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982). *See generally* Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33.

36. Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482–83 (9th Cir. 1983); EEOC v. Federal Reserve Bank, 698 F.2d 633, 671 (4th Cir. 1983), *rev'd on other grounds sub nom.* Cooper v. Federal Reserve Bank, 104 S. Ct. 2794 (1984); *see also* Coser v. Moore, 739 F.2d 746 (2d Cir. 1984); Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Pack v. Energy Research & Dev. Admin., 566 F.2d 1111 (9th Cir. 1977).

37. International Bhd. of Teamsters v. United States, 431 U.S. 324, 337–43 (1977); Lilly v. Harris-Teeter Super Markets, 720 F.2d 326, 336 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2154 (1984); Boykin v. Georgia-Pac. Corp., 706 F.2d 1384, 1391 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 999 (1984).

38. International Bhd. of Teamsters v. United States, 431 U.S. 324, 337 (1977). That burden will not be satisfied by general allegations that the best applicant was hired. *Id.* at 342 n.24; Miles v. M.M.C. Corp., 750 F.2d 867, 874–75 (11th Cir. 1985).

39. Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1131 (11th Cir. 1984); Lewis v. Tobacco Workers'

B. *Individual Disparate Treatment: The* McDonnell-Douglas *Model: Factual Inferences and the Defendant's Burden to Establish a "Legitimate" Reason*

Motivation can be established in individual cases of disparate treatment by relying on indirect, objective, nonstatistical elements. In *McDonnell Douglas Corp. v. Green*[40] the Court established the model for proving illegal motivation by this method. The plaintiff carries the initial burden and must prove (1) that the defendant had a vacancy, (2) that the plaintiff met the qualifications[41] for the position, (3) that she applied[42] for the position, and (4) that the defendant rejected her. If the plaintiff belongs to a protected class and a person outside that class was selected,[43] the court will infer that the decision to reject the plaintiff was based on her protected class membership. The Supreme Court explained that this proof creates a prima facie showing of illegal motive because "it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[44] This prima facie showing raises

> an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that

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Int'l Union, 577 F.2d 1135, 1141–42 (4th Cir. 1978), *cert. denied sub nom.* Lewis v. Philip Morris, Inc., 439 U.S. 1089 (1979). See 42 U.S.C. § 2000e–2(j) (1982) which prohibits a finding of illegality based solely upon an imbalanced work force.

40. 411 U.S. 792 (1973); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978).

41. To be "qualified," the plaintiff need only prove that she possesses the defined, objective qualities the employer deemed necessary. *See infra* text accompanying notes 58–69.

42. *See, e.g.*, EEOC v. F & D Distrib., Inc., 728 F.2d 1281 (10th Cir. 1984), in which the court held that the plaintiff had not applied for the job. After being told that the vacancy was not a "woman's job" she left without having completed a formal application. *Id.* at 1283. However, if the defendant never posts notice of the job opportunity, the plaintiff's indication of desire to be considered for the available job opening is considered an application. Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1133–34 (11th Cir. 1984).

43. The *McDonnell Douglas* Court listed the four elements that established plaintiff's prima facie case in the facts before it:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The Court later indicated that this formula for a prima facie case "was not intended to be an inflexible rule" and that the "prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575–76 (1978).

If the defendant demonstrates that a person of the same class as the plaintiff was selected to fill the vacancy, the plaintiff's prima facie showing of illegal discrimination might be refuted. Freeman v. Lewis, 675 F.2d 398, 400 (D.C. Cir. 1982); Jones v. Western Geophysical Co. of Am., 669 F.2d 280, 284 (5th Cir. 1982). *Contra* Diaz v. American Tel. & Tel., 752 F.2d 1356 (9th Cir. 1985). *Cf.* Keys v. Lutheran Family & Children's Serv., 668 F.2d 356, 359–60 (8th Cir. 1981) (Gibson, J., concurring in part and dissenting in part) (when the plaintiff is replaced by a person of the same sex and race, a trial court need not infer that the plaintiff's discharge was based on racial or sexual discrimination). However, if the issue is the discriminatory application of a rule along class lines, the fact that a person of the same class as the plaintiff was ultimately selected will not refute the prima facie case. Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1186 (11th Cir. 1984); Howard v. Roadway Express, 726 F.2d 1529, 1534 (11th Cir. 1984); EEOC v. Brown & Root, Inc., 688 F.2d 338, 340 (5th Cir. 1982).

In ADEA cases, proof that a person substantially younger than the plaintiff was hired should suffice to establish the plaintiff's case. Tribble v. Westinghouse Elec. Corp., 669 F.2d 1193, 1196 (8th Cir. 1982), *cert. denied*, 460 U.S. 1080 (1983); Douglas v. Anderson, 656 F.2d 528, 532–33 (9th Cir. 1981); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109, 1112 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981). *Contra* Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982); Williams v. General Motors Corp., 656 F.2d 120, 128–29 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). *See generally* Player, *supra* note 8, at 634–44.

44. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.[45]

The inference of discriminatory motive arising from a prima facie case[46] is not conclusive; it can be refuted. A defendant can do so by "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection."[47] The defendant's burden is not one of persuasion on the issue of motivation.[48] However, the defendant does not carry its evidentiary burden merely by denying illegal motivation or by asserting a reason in its pleadings or in the arguments of counsel.[49] Defendant's burden is an evidentiary obligation to raise a genuine issue of fact, "through the introduction of admissible evidence, [as to] the reasons for the plaintiff's rejection."[50] In short, the defendant bears the burden of going forward with the evidence.[51]

Ultimately, an analysis of whether the defendant has carried its burden must turn on a determination of whether the defendant's evidence can support a factual inference of legal motivation. That evidence must be of sufficient strength to place in issue the inference of illegal motivation that flows from the plaintiff's prima facie showing. The defendant's first step is to establish the factual existence of its articulated reason. Only if the reason in fact exists can a fact finder conclude that the articulated reason, rather than an illegal consideration, motivated the defendant's actions. If a defendant cannot establish the existence of its proffered reason, drawing an inference that the proffered reason actually motivated the employer's action becomes impossible.[52]

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45. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

46. The inference of illegal motive that flows from the prima facie case is more than a "permissible" inference that allows, but does not require, the fact finder to rule in favor of the plaintiff. The inference of illegal motive must be accepted unless the defendant places it in issue by presenting legally sufficient contradictory evidence. Thus, the defendant's failure to place the inference of illegal motivation in issue results in a judgment, as a matter of law, for the plaintiff. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Paxton v. Union Nat'l Bank, 688 F.2d 552, 569, 572 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

47. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

48. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24–25 (1978) (per curiam) (The defendant meets its burden of dispelling the adverse inference raised from the plaintiff's prima facie case if it articulates some legitimate, nondiscriminatory reason. The defendant does not need to prove, at this stage, the absence of discriminatory motive.).

49. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 920–21 (6th Cir. 1984); *cf.* Williams v. City of Montgomery, 742 F.2d 586, 588 (11th Cir. 1984) (the defendant's *subjective* justifications for firing the plaintiff were insufficient to establish a nondiscriminatory, legitimate reason); Uviedo v. Steve's Sash & Door Co., 738 F.2d 1425, 1430 (5th Cir. 1984) (The defendant cannot, after the fact, rely on facts in the record to support its reason for the employment decision. In addition, a general policy statement regarding pay will not sufficiently rebut the plaintiff's prima facie case.).

50. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

51. For an explanation of the burden of production, see C. MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE 783 (E. Cleary 2d ed. 1972); 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2484–2487 (J. Chadbourn rev. ed. 1981). *See generally* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129 (1980).

52. Lower court cases that interpret the nature of a defendant's burden are in considerable disarray. A number of courts have indicated that the defendant's burden does not go beyond the introduction of evidence that the defendant's articulated reason might factually exist. These courts hold that a finding that the reason does not exist only helps establish pretext and does not entitle a plaintiff to judgment. Ford v. Nicks, 741 F.2d 858, 863 (6th Cir. 1984); Brooks v. Ashtabula County Welfare Dep't, 717 F.2d 263, 267 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1687 (1984); Danzel v. North St. Paul-Maplewood-Oakdale Ind. School Dist., 663 F.2d 65, 67 (8th Cir. 1981) (en banc per curiam); Sanchez v. Texas

If the articulated reason does exist, it must be of sufficient evidentiary strength and significance to permit a fact finder to infer that the articulated reason, rather than illegal considerations, motivated the employer's actions. A reason may support an inference of legal motivation, and thus it may satisfy the defendant's evidentiary burden, even if the reason was not necessary to the employer's safe and efficient operation.[53] Similarly, the mere existence of a "better" selection device or a device that might have a less discriminatory effect does not destroy the legitimacy of an otherwise rational reason.[54] However, to be "legitimate" the reason must be lawful.[55] Furthermore, the defendant's articulated reason for rejecting the plaintiff

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Comm'n on Alcoholism, 660 F.2d 658, 661 (5th Cir. 1981); St. Peter v. Secretary of the Army, 659 F.2d 1133, 1138 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

Other courts, often creating conflicts within their circuits, have indicated that a defendant must establish that at the time it made the employment decision, the reason articulated for the treatment of the plaintiff existed or the defendant believed it existed. Sylvester v. Callon Energy Servs., Inc., 724 F.2d 1210, 1213 (5th Cir. 1984); Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1383 (11th Cir. 1983); Lamphear v. Prokop, 703 F.2d 1311, 1316–17 (D.C. Cir. 1983); Peters v. Lieuallen, 693 F.2d 966, 969 (9th Cir. 1982); Miller v. WFLI Radio, Inc., 687 F.2d 136, 138 (6th Cir. 1982).

Also, some courts have indicated that when a plaintiff proves that the reason does not exist, she establishes, as a matter of law, that the defendant's articulated reason is pretextual. Martinez v. El Paso County, 710 F.2d 1102, 1105 (5th Cir. 1983); Eastland v. Tennessee Valley Auth., 704 F.2d 613, 618–20 (11th Cir. 1983), *cert. denied sub nom.* James v. Tennessee Valley Auth., 104 S. Ct. 1415 (1984); Mohammed v. Callaway, 698 F.2d 395, 399 (10th Cir. 1983); Chaline v. KCOH, Inc., 693 F.2d 477, 479 (5th Cir. 1982). *See generally* Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17 (1984). The defendant has an intermediate burden to produce evidence that the articulated reason exists. If uncontested, that evidence requires a court to find that the reason exists, from which the court must infer that the reason motivated the action. *Id.* at 34. However, if the plaintiff presents evidence contesting the factual existence of the given reason, the defendant must carry the burden of convincing the fact finder that the reason exists. If the fact finder does not believe the reason exists, no inference can be drawn that the reason motivated the employer's action; judgment must be for the plaintiff. Conversely, if the fact finder believes the reason exists, an inference that the reason motivated the employer's action is created. At this point, the plaintiff must carry an ultimate burden of persuading the fact finder that the reason was being used as a pretext for discrimination. *See also* Furnish, *supra* note 12 (The burden of articulation on the defendant is too light. The Court should adopt a standard that places a burden on the defendant to establish legal motivation.).

53. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–06 (1973). The court of appeals in *McDonnell Douglas* apparently utilized a "necessity" standard to hold that the defendant had failed to carry its burden. The Supreme Court reversed the lower court's decision, holding that the defendant, to satisfy its burden of articulating a legitimate, nondiscriminatory reason, does not need to prove that its reason was a business necessity. McDonnell Douglas satisfied its "burden of articulation" by asserting that the plaintiff was not rehired because he had engaged in unlawful activity directed against McDonnell Douglas. *Id.* at 803. *Accord* United States Postal Serv. v. Aikens, 460 U.S. 711, 715 (1983) (By implication, the court held that the defendant's proffered reason did not have to be one necessary to the employer's business. It was enough to articulate that the plaintiff was not promoted because he refused too many lateral transfers.); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254–55, 257 (1981) (to satisfy its initial burden, the employer only needs to produce admissable evidence that allows the trier of fact to conclude that the employment decision was not motivated by discriminatory animus.).

54. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577–78 (1978).

55. With a passing remark, the Court in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), indicated that the defendant's reason must be lawful. *Id.* at 362. The Ninth Circuit in Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984), suggested that inquiries that concerned the plaintiff's personal life and violated her constitutional right of privacy could not be legitimate. *Id.* at 468. Likewise, the court in Curler v. City of Fort Wayne, 591 F. Supp. 327 (N.D. Ind. 1984), held that union membership is not a legitimate reason sufficient to carry a defendant's burden in a Title VII case. *Id.* at 336 n.8. *See* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 61 (1980).

It has been suggested that a legitimate reason is merely one that is not inherently linked to a classification proscribed by Title VII. Smith, *Employer Defenses in Employment Discrimination Litigation: A Reassessment of Burdens of Proof and Substantive Standards Following* Texas Department of Community Affairs v. Burdine, 55 TEMPLE L.Q. 372, 379 (1982). However, accepting such a limited reading of "legitimate" gives an employer the ability to frustrate broad public policy by using the admitted violation of one statute to defend against the violation of another. It would be incongruous to allow, for example, the employer to defend against a charge of race or sex discrimination by pleading that it discriminated against the plaintiff because of his or her age, handicap, or union activity. Player, *Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis*, 36 MERCER L. REV. ____ (1985); *see also* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C.L. REV. 419, 437 (1982) (a reason must have some relationship to a business goal).

must be sufficiently rational to support an inference of legal motivation. A reason that is irrational, arbitrary, or idiosyncratic will not support an inference that the proffered reason motivated the employer's action.[56]

If an employer's evidence is not sufficient for a fact finder to infer that the proffered reason actually motivated the employer's adverse action, the plaintiff's prima facie case of illegal motivation has not been placed in issue. In this case, the defendant has failed to satisfy its burden of casting doubt on the inference of illegal animus and the plaintiff is entitled to a judgment as a matter of law. Thus the defendant's burden of articulating a legitimate, nondiscriminatory reason is in essence an evidentiary burden to show the existence of a reason that could have motivated its employment decision. Once the defendant establishes such a reason, an inference of legal motivation is created and the plaintiff's prima facie case is placed in issue. The plaintiff must then introduce evidence that the defendant's proffered reason is merely a pretext. At this point the plaintiff must carry the ultimate burden of persuading the fact finder that the defendant was illegally motivated.[57]

III. Comparative Qualifications as Part of The Plaintiff's Prima Facie Case

In *McDonnell Douglas Corp. v. Green*,[58] the Court indicated that improperly motivated disparate treatment can be inferred only if the plaintiff establishes that she was qualified to perform the job.[59] The Court, however, did not define the term "qualified." In *International Brotherhood of Teamsters v. United States*,[60] the Court indicated that the plaintiff's prima facie case should include proof of "absolute or relative" qualifications.[61] Some courts have latched onto this dictum and have required that the plaintiff's prima facie showing include proof that she possessed equal or greater qualifications than the person selected for the vacancy.[62] These courts have

56. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (A reason is legitimate when it is "reasonably related to the achievement of some legitimate purpose."). Miller v. WFLI Radio, Inc., 687 F.2d 136, 138 (6th Cir. 1982) (employer's burden is to produce "business reasons"); *see also* Carmichael v. Birmingham Saw Works, 738 F.2d 1126 (11th Cir. 1984); White v. Vathally, 732 F.2d 1037 (1st Cir.), *cert. denied*, 105 S. Ct. 331 (1984); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984); United States v. City of Miami, 614 F.2d 1322, 1346 (5th Cir. 1980), *modified*, 664 F.2d 435 (5th Cir. 1982); EEOC v. Spokane Concrete Prods., Inc., 534 F. Supp. 518, 523 (E.D. Wash. 1982); Furnish, *supra* note 55, at 437; *cf.* Smith, *supra* note 55, at 379.

57. The trial court does not actually need to proceed with a formal three-step minuet with the plaintiff's production of a prima facie case, followed by the defendant's articulation of a legitimate reason, concluded by the plaintiff's proof of pretext. The court may require the plaintiff to present all of her evidence of illegal motive and then require the defendant to present all of its evidence that suggests proper motivation. Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Sime v. Trustees of Cal. State Univ., 526 F.2d 1112, 1114 (9th Cir. 1975). However, the court would still need to order its analysis around those three steps, particularly if a jury must be instructed. *But see* United States Postal Serv. v. Aikens, 460 U.S. 711 (1983) (suggesting a much more unstructured analysis that simply evaluates all of the presented evidence to determine if the plaintiff has carried its ultimate burden of proving illegal motivation). The ultimate finding on the issue of motivation is one of fact. If made by the court it is subject to reversal only if clearly erroneous. Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985).

58. 411 U.S. 792 (1973).

59. *Id.* at 802.

60. 431 U.S. 324 (1977).

61. *Id.* at 358 n.44.

62. *See, e.g.*, Anderson v. City of Bessemer City, 717 F.2d 149, 153 (4th Cir. 1983), *rev'd*, 105 S. Ct. 1504 (1985); Cuthbertson v. Biggers Bros., Inc., 702 F.2d 454, 465 (4th Cir. 1983); Cartogena v. Secretary of Navy, 618 F.2d 130, 133 (1st Cir. 1980); *see also* Mason v. Continental Ill. Nat'l Bank, 704 F.2d 361, 366 (7th Cir. 1983) (suggesting that "qualified" means the minimal ability to perform routine jobs). However, if the vacancy is for a higher-level position, the plaintiff must establish relatively superior credentials.

reasoned that an inference of discriminatory motive arises only when a plaintiff offers proof of his or her relative superiority. If a plaintiff fails to establish her superior qualifications, she also fails to eliminate one of the most common nondiscriminatory reasons underlying an employment decision and, in turn, an inference of discriminatory motive is precluded.

Most courts, however, properly hold that a prima facie case of discrimination does not require proof of plaintiff's relative job qualifications. An initial inference of illegal motive can be formed when proof is presented that the plaintiff possessed the qualifications established by the employer as being necessary for successful job performance.[63] If the plaintiff was rejected because the person selected for the position had additional qualities that the employer believed would make that person a superior candidate, those qualities would be a "reason" for the plaintiff's rejection and the defendant must articulate this as part of its evidentiary burden. Thus, proof of relative qualifications is not part of the plaintiff's prima facie case, but can be a legitimate, nondiscriminatory reason for rejecting an objectively qualified minority applicant.[64]

This approach accurately reflects the proper balance between the burdens of a plaintiff and a defendant as allocated by *McDonnell Douglas*. The defendant must establish basic job qualifications. Unless it has an adverse impact on protected classes, any qualification may be imposed in good faith by the employer. When the defendant rejects the plaintiff for reasons other than the plaintiff's failure to meet these employer-established qualifications, the employer, not the plaintiff, knows the precise reason for this decision. The employer-defendant, therefore, must bear the evidentiary obligation to articulate that reason. When that reason is the comparative

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63. Thorne v. City of El Segundo, 726 F.2d 459, 464 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984); Eastland v. Tennessee Valley Auth., 704 F.2d 613, 625 (11th Cir. 1983), *cert. denied sub nom.* James v. Tennessee Valley Auth., 104 S. Ct. 1415 (1984); EEOC v. Federal Reserve Bank, 698 F.2d 633, 671 (4th Cir. 1983), *rev'd on other grounds sub nom.* 104 S. Ct. 2794 (1984); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 813 (8th Cir. 1983); Aikens v. United States Postal Serv., 665 F.2d 1057, 1059 (D.C. Cir. 1981), *rev'd on other grounds*, 460 U.S. 711 (1983); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981).

64. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court never suggested that the term "qualified" had any meaning other than an absolute one. Indeed, there was no suggestion that by establishing his prima facie case the plaintiff proved anything more than his ability to perform the job. The Court did not inquire into the comparative abilities of the persons hired. Similarly, in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court assumed that the plaintiffs had established a prima facie case by proving that they were capable of performing the job requirements of bricklayers. It clearly did not demand proof that the plaintiffs were more qualified bricklayers than were the applicants selected for the job. The Court placed the burden on the defendant to articulate a reason for the plaintiffs' rejection; the defendant satisfied this burden by proving that it selected incumbents because, unlike the plaintiffs, the incumbents were known to the supervisor.

In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court held that the female plaintiff had established a prima facie case of sex discrimination by proving her basic ability to perform the job. This demonstration imposed on the defendant the burden to establish the reason for rejecting the plaintiff. The Court held that the defendant does not need to prove that the incumbent was superior to the plaintiff in order to establish the legitimacy of its articulated reason. However, the Court in no way suggested that the plaintiff should have been required to prove that she was more qualified for the position than was the male who was selected. Both *Furnco* and *Burdine* indicate that when a defendant articulates a legitimate reason for the rejection of a qualified plaintiff, the plaintiff may present evidence of his or her general superiority over the selected candidate. However, the *Furnco* and *Burdine* Courts did not treat this evidence as a part of the plaintiff's prima facie showing. Rather, this evidence merely supported the conclusion that the defendant's articulated reason was pretextual. Proof of the plaintiff's comparative superiority thus enters the proceedings at the third step of the *McDonnell Douglas* model, not the first step. Comparative superiority is a plaintiff's response to the defendant's articulation, not a condition that precedes a defendant's obligation to articulate a reason for its decision. *See generally* Note, *Relative Qualifications and the Prima Facie Case in Title VII Litigation*, 82 COLUM. L. REV. 553 (1982).

superiority of the person who was hired, then, as when any other reason is advanced, the accepted applicant's superiority must be proved by the defendant.

"Relative qualifications" is a vague and subjective concept, subject to innumerable interpretations. The defendant, not the plaintiff, is in a position to define that concept. If the plaintiff were required to identify the qualities that the defendant might use to make an employment decision and to compare all of his or her qualities with all of those possessed by the person who was hired, the plaintiff would face an impossible burden. Conversely, requiring the employer to articulate the precise reason it selected a particular person when confronted with a choice between two objectively qualified candidates is logical and relatively easy.

It is also important in allocating burdens of proof to force the employer to articulate as precisely as possible its reason for rejecting a qualified minority applicant.[65] Only when a precisely articulated reason for the rejection is expressed, can the plaintiff establish the pretextual use of that reason in her case. If the plaintiff is required to prove relative qualifications as a condition precedent to the defendant's obligation to articulate its reason for rejecting the plaintiff, the ability of many plaintiffs to demonstrate a comparative application of the reason will be destroyed. Only plaintiffs who surmount the formidable hurdle of proving their relative superiority to the incumbent would force the employer to articulate precisely a reason.

Arguably, since the plaintiff benefits from liberal discovery rules, the plaintiff could uncover the reason underlying the employer's decision;[66] thus it arguably makes little difference which litigant has the burden of proving the relative qualities of the applicants.[67] In some cases this hypothesis might be true. Discovery rights, however, are irrelevant in this context: the primary issue is the proper allocation of evidentiary burdens. Wholly apart from the information that might be discovered, a requirement that a plaintiff prove subjective superiority over her competitors is a significantly more onerous burden than a requirement that a plaintiff prove that she possessed the objective qualifications for the position. If a burden of proving relatively superior qualifications is placed on the plaintiff as part of a prima facie showing, rather than placing a burden of articulating relative merit as a reason for its decision on the defendant, different substantive results can be expected in a significant number of cases.

Furthermore, the plaintiff's discovery process may uncover only vague or perhaps contradictory articulations. If, at trial, the plaintiff must shoulder an initial burden of proving superiority over the incumbent, the plaintiff will be required to

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65. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) (the defendant's explanation of its legitimate reasons must be clear and reasonably specific).

66. *Id.*; *see also* FED. R. CIV. P. 23–36.

67. *See* United States Postal Serv. v. Aikens, 460 U.S. 711 (1983) (little emphasis should be placed on relative burdens). The *Aikens* Court intimated that both parties should simply place their evidence before the fact finder and the fact finder should resolve the issue of motivation on the basis of this unstructured presentation. Such an unstructured approach does not necessarily suggest that the usual evidentiary burdens should be ignored when analyzing the facts. This is particularly true when, as under the ADEA and in suits involving Title VII, 42 U.S.C. § 1981 (1982), a jury is mandated. In those cases, the court must determine, as a matter of law, whether the evidence warrants submitting the ultimate issue of motivation to the jury, and the court must properly instruct the jury on those evidentiary burdens. *See* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

respond to each of the various qualities the defendant might have utilized in making the decision. If, at the close of the plaintiff's case, the court felt that the plaintiff failed to eliminate each and every possible element of the incumbent's relative superiority, judgment would be awarded to the defendant, and the defendant would never have been asked to define precisely its actual reason for rejecting the plaintiff. Therefore, notwithstanding the existence of liberal discovery rules, placing the obligation to prove relative superiority is a significantly greater burden on the plaintiff than the *McDonnell Douglas* Court envisioned, a burden which, contrary to the Court's observation, indeed is "onerous."[68]

Finally, if the plaintiff is forced to establish relative qualifications as part of a prima facie case, the three-step approach of *McDonnell Douglas* would be undermined; the entire trial would tend to be telescoped into the plaintiff's prima facie showing. Ultimately all reasons for rejecting an applicant might involve the applicant's relative or absolute lack of perceived qualities. One must be careful, therefore, not to translate the "reason" for a particular decision into a "qualification" which the plaintiff is then forced to prove.[69] Should this telescoping occur by redefining all "reasons" in terms of "qualifications," the defendant's evidentiary burden would almost entirely be eliminated. In this context, the qualities of the incumbent, when compared to the qualities of the plaintiff, must be considered a "reason" that the defendant must establish, and not a "qualification" to be proved by the plaintiff.

The term qualification thus should be defined in objective, noncomparative terms. An applicant is qualified within the meaning of *McDonnell Douglas* if she meets the objective requirements established by the employer prior to the selection process. If no requirements have been announced, a plaintiff is qualified if she, in noncomparative terms, is capable of performing the tasks of the job. In short, a plaintiff is qualified when, had no other applicant sought a position, a properly motivated employer would have hired her.

IV. COMPARATIVE EVIDENCE: DEFENDANT'S EVIDENTIARY BURDEN

A. *Identifying Three Types of Comparative Evidence: A Survey*

It was once said, "[C]omparative evidence lies at the heart of the rebuttal of a prima facie case of employment discrimination."[70] Implicit in this broad statement is

68. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Miles v. M.M.C. Corp., 750 F.2d 867, 871 (11th Cir. 1985).

69. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The "reason" for rejecting the plaintiff (trespass) could have been defined as a "qualification." Thus, it could have been said that plaintiff failed to prove that he was qualified because he failed to prove that he was not guilty of the trespass. Significantly, the Court did not analyze the situation in this manner. The plaintiff was qualified because he could perform the job. The trespass was treated as a reason that the defendant had to articulate. Similarly, in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the rejection of the plaintiffs because they were walk-on applicants was not treated as being a qualification for the position. Rather, like the plaintiffs in *McDonnell Douglas*, the plaintiffs were deemed qualified by having the ability to perform the job tasks. The fact that they were walk-on applicants was a legitimate reason for their rejection. The Court did not transform the reason for the rejection (walk-on) into a qualification for the position. *Cf.* Carlile v. South Routt School Dist., 739 F.2d 1496 (10th Cir. 1984), in which a female teacher of English and history was discharged and replaced with a male who taught history and coached the basketball team. The court held that the plaintiff had not established a prima facie case because she was not replaced by a person of similar qualifications. The plaintiff was not qualified to coach the basketball team. The court could have reached the same result by holding that the ability to coach was a legitimate, nondiscriminatory reason for discharging the plaintiff and replacing her with someone who had that ability.

70. Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977); East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975).

that to refute a prima facie case of disparate treatment, the employer must establish that the person selected for the position was a more qualified candidate than the rejected plaintiff. Absent such a showing, the plaintiff is entitled to prevail. The Supreme Court's broad pronouncements in *Texas Department of Community Affairs v. Burdine*,[71] however, suggested an opposite extreme. The *Burdine* Court suggested that comparative evidence plays no role in defining the defendant's burden to articulate legitimate reasons for its action; rather, comparisons between the qualifications of the plaintiff and the qualifications of the person selected are relevant *only* to show that the articulated qualifications of the person selected were pretextual.[72]

Neither extreme accurately characterizes the role of comparative evidence. To suggest that comparisons are never relevant in evaluating a defendant's burden to articulate a legitimate reason is as improper as it is to suggest that comparisons are always a part of defendant's burden. In reality, the defendant's burden in situations involving comparisons of the qualities of qualified[73] candidates is different, depending on a precise evaluation of the nature of the comparison.

Comparisons can be categorized into four broad patterns: (1) Direct factual comparisons between the plaintiff and the person selected or retained; (2) contextual comparisons in which the precise reason for rejecting the plaintiff is applied to the persons selected by the defendant to determine whether those persons possess or lack the reason articulated to reject the plaintiff; (3) collateral comparisons of characteristics not articulated by the defendant as the reason for making its employment decision; and (4) inconsistent use of the reason.

A direct comparison is made when the employer asserts that the person it favored was "better than," "more qualified than," or "superior to" the plaintiff. The *reason* for the employer's action *is a comparison*. Such a reason cannot stand alone; it has no vitality independent of qualities possessed by the person favored by the employer. When a comparison was the reason for the employer's treatment of the plaintiff, the employer must establish the existence of this reason, and the capacity of the reason to support an inference that the *reason*, rather than illegal factors, moti-

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71. 450 U.S. 248 (1981).

72. In discussing the lower court's ruling, Justice Powell wrote:

> The court of appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. The court of appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated. . . .
>
> The views of the court of appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Id. at 258.

73. Relative qualifications are not part of the plaintiff's prima facie case. The plaintiff will establish that she is qualified if she demonstrates possession of the posted, uniformly-required job prerequisites. *See supra* text accompanying notes 58–69. Thus, any attack on the plaintiff's qualifications to perform the job would be an attack on the prima facie case. *See, e.g.*, Jackson v. United States Steel Corp., 624 F.2d 436, 442 (3d Cir. 1980); Peters v. Jefferson Chem. Co., 516 F.2d 447 (5th Cir. 1975). However, when the defendant's argument that the person selected is *relatively* more qualified than the plaintiff is a reason for rejecting the plaintiff that must be analyzed as part of the defendant's burden to articulate a reason.

vated the defendant's decision.[74] Thus, when the reason for rejecting the plaintiff allegedly is based on a comparison, the defendant must establish that comparison.

The second major scenario involving comparative evidence is presented when other evidence places an apparently absolute, noncomparative reason in a comparative context, which makes it impossible for the reason to carry an inference of legal motivation. This contextual comparison does not attack the factual existence of the articulated reason; rather it attacks the legitimacy of the reason and demonstrates, by a comparative application, why the reason is insufficient to sustain an inference that the articulated reason, alone, motivated the employer in its treatment of the plaintiff. The reason thus is applied comparatively to the favored employee.

To illustrate, assume the defendant articulates that the plaintiff was fired because she was caught stealing. Clearly, discharge for theft is a legitimate, nondiscriminatory reason, which if true or believed to be true carries defendant's evidentiary burden.[75] The articulated reason (theft) is facially noncomparative because it is capable of having independent vitality wholly apart from the qualities of other persons. However, if the evidence discloses that persons of a different race were engaged in the same theft for which the plaintiff was discharged, and these equally guilty persons were retained, the absolute reason (theft) is placed in a comparative context. The quality deemed controlling by the defendant was also possessed by the plaintiff and by persons of a different race; however, those persons who possessed the same quality as the plaintiff did not receive the same treatment as the plaintiff. This comparative application of the reason precludes the initially articulated reason (theft) from supporting an inference that theft was the real reason motivating the employer's action.[76]

The contextual, comparative application of an otherwise absolute reason may prohibit that reason from supporting any inference of legal motivation. When this happens the employer has not met its burden of placing in issue the inference of illegal motivation which was drawn from the plaintiff's prima facie case. In this situation, the plaintiff is entitled to judgment as a matter of law. Because the comparative context renders an otherwise legitimate reason illegitimate, the plaintiff should carry the initial evidentiary burden of going forward with the evidence that establishes the comparative context.

The third comparison involves an evaluation of factors that are collateral to the

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74. As explained, *supra* note 52, the nature of defendant's burden is to do more than simply present evidence of the factual existence of the reason. If that evidence is challenged, defendant carries a burden of proving the factual existence of the reason. Notes 55 and 56, *supra*, explain that the reason itself must be lawful and sufficiently rational for a fact finder to conclude that the reason could have motivated the treatment of plaintiff. If defendant fails to establish the factual existence of the reason (to be distinguished from the ultimate fact that the reason motivated the action), or if the reason is not rationally related to bona fide employer goals, plaintiff is entitled to a judgment as a matter of law.

75. *See, e.g.*, Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984); Boner v. Board of Comm'rs of Little Rock Mun. Water Works, 674 F.2d 693 (8th Cir. 1982); Corley v. Jackson Police Dep't, 566 F.2d 994 (5th Cir. 1978).

76. This is precisely the situation presented in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). For a detailed discussion of this case see *infra* text accompanying notes 91–93. *See also* Williams v. City of Montgomery, 742 F.2d 586 (11th Cir. 1984) (black firefighter discharged for felony conviction, white employee with similar conviction not discharged; employer's burden included establishing a legitimate reason for the difference in treatment); Corley v. Jackson Police Dep't, 566 F.2d 994 (5th Cir. 1978) (police officers involved in similar misconduct; allegedly, black officers were subjected to a different standard of investigation and evaluation).

reason originally articulated by the employer as the basis for rejecting the plaintiff. For example, assume that the defendant selected an incumbent employee instead of the plaintiff for a particular job and that its articulated reason for doing so was that the incumbent had a high school diploma. If the plaintiff demonstrates that she also had a high school diploma, the plaintiff places the defendant's reason (diploma) in a comparative context so that the reason no longer supports an inference of legal motivation. However, assume the plaintiff concedes that she lacked the controlling credential (diploma) but demonstrates that she has training and experience far more relevant to job performance than a diploma. This evidence does not attack the comparison (diploma vs. no diploma) articulated by the employer, but raises other factors (training and experience) collateral to the articulated reason. Such a collateral comparison neither challenges the existence of the reason nor destroys the inference-bearing capacity of the articulated reason; rather, it suggests that the employer's stated reason might not be the actual motivation for its action. Therefore, such collateral comparisons are evidence of pretext which will permit the fact finder to address whether the articulated reason or illegal factors motivated the employer. Such a collateral comparison, however, does not entitle the plaintiff to a judgment as a matter of law. A defendant carries its burden by presenting evidence of a reason from which legal motivation may be inferred.[77] The plaintiff must carry the burden of persuading the fact finder that the defendant was motivated by illegal factors.

A final category of comparison involves the application of the articulated reason to employment decisions made prior to or subsequent to the selection that the plaintiff challenges. A comparison is made to check for consistency. For example, the defendant's articulation that its reason for selecting the male incumbent over the female plaintiff was that the male applicant had a diploma that the female lacked would be proof of a legitimate reason. However, the plaintiff might present evidence that in making a decision for a similar vacancy two months before (or after the employer rejected the plaintiff), a female who possessed a diploma was rejected over a male who lacked the credential, and the reason given at that time was that the male had more experience. In short, the same reason that was asserted as controlling in making the challenged decision (diploma) was not asserted by the employer in making other similar employment decisions. Inconsistency in the application of an articulated reason is strong evidence of pretext. However, the failure to apply uniformly the articulated reason does not necessarily establish that it did not motivate the present decision.

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77. This is essentially the fact pattern of Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985). *See also* Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983). In *Hawkins* the court also held that the superiority of experience over the college degree possessed by the person selected was evidence of pretext. It did not hold the reason incapable of supporting a judgment for defendant. *See also* United States Postal Serv. v. Aikens, 460 U.S. 711 (1983) (black plaintiff denied promotion because he lacked "collateral experience," presented evidence of superior education, experience, and seniority); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (female plaintiff discharged for "personality conflicts," presented evidence of superior credentials). In both cases the evidence was correctly analyzed as pretext evidence. *Accord* Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982).

B. *Analyzing the Four Types of Comparisons*

1. *Type I: Direct Comparisons—Defendant's Burden is to Establish the Existence of Comparative Reasons*

Assume the employer, in responding to a prima facie case of sex discrimination, asserts that its reason for rejecting a female plaintiff for an employment position was the superior qualifications of the male selected for the vacancy. Inherently, the reason comprehends a direct comparison between the qualities and credentials of the male who was awarded the job and those of the female plaintiff who was rejected. The reason itself is thus a simple comparison.

Merely stating a reason or conclusion in a pleading or argument does not satisfy the defendant's burden of going forward with proof. The defendant has a burden of producing evidence sufficient to support its assertion that the plaintiff was denied the employment opportunity because of the articulated reason. To carry that burden, the defendant's evidence must be "clear and reasonably specific."[78] Therefore, the first problem with the defendant's articulated reason (qualifications) is its imprecision and vagueness.

Subjective conclusions are suspicious because in their vagueness lies the potential for conscious and unconscious prejudice. Their very imprecision gives an employer the ultimate ability to cloak prejudice under the fabric of meaningless and impenetrable platitudes.[79] When objectivity is possible, therefore, articulating subjective conclusions devoid of normative standards usually is inadequate to carry a defendant's evidentiary burden.[80] On some occasions, however, particularly when job performance, and thus job selection, is dependent upon subjective factors, the courts permit a limited use of subjective evaluations.[81] The conclusion's capacity to sustain an inference that the proffered reason, rather than illegal animus, motivated the decision distinguishes legitimate subjective conclusions from illegitimate subjectivity. If the decisionmaker could have used readily available, more reliable objec-

78. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.9 (1981); Williams v. City of Montgomery, 742 F.2d 586 (11th Cir. 1984); Davis v. Combustion Eng'g Inc., 742 F.2d 916, 920–21 (6th Cir. 1984); White v. Vathally, 732 F.2d 1037 (1st Cir.), *cert. denied*, 105 S. Ct. 331 (1984); *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 432–33 n.24 (1977).

79. Robinson v. Polaroid Corp., 732 F.2d 1010, 1014–16 (1st Cir. 1984); Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1383 (11th Cir. 1983); Paxton v. Union Nat'l Bank, 688 F.2d 552, 563 n.15 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 867 (9th Cir. 1982); Barnett v. W.T. Grant Co., 518 F.2d 543, 549–50 (4th Cir. 1975); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972); *see generally*, Stacy, *Subjective Criteria in Employment Decisions Under Title VII*, 10 GA. L. REV. 737 (1976).

80. *See, e.g.*, Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982) (Voice quality of rejected white applicant would not appeal to a black radio audience. Held: unduly subjective); Robbins v. White-Wilson Medical Clinic, Inc., 660 F.2d 1064, 1067 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 969 (1982) (rejection of black applicant because her personality was "hostile," "intimidating," and "yucky" was insufficient to carry defendant's burden); *cf.* Parker v. Federal Nat'l Mfg. Ass'n, 741 F.2d 975 (7th Cir. 1984) (plaintiff's rejection for not being "personable" was legitimate); Smithers v. Bailar, 629 F.2d 892, 895 (3d Cir. 1980) (person selected "more articulate").

81. *E.g.*, Verniero v. Air Force Academy School Dist., 705 F.2d 388 (10th Cir. 1983) (school principal); Grano v. Dep't of Dev., 699 F.2d 836 (6th Cir. 1983) (public relations position); Harris v. Group Health Ass'n, 662 F.2d 869 (D.C. Cir. 1981) (physicians); Cross v. U.S. Postal Serv., 639 F.2d 409 (8th Cir. 1981) (supervisor); Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) (professors); Frausto v. Legal Aid Soc'y, 563 F.2d 1324 (9th Cir. 1977) (attorneys); Nath v. General Elec. Co., 438 F. Supp. 213 (E.D. Pa. 1977), *aff'd*, 594 F.2d 855 (3d Cir. 1979) (engineers).

tive standards, then unnecessary subjectivity is not legitimate because it cannot support an inference that the employer was properly motivated.[82]

Therefore, a general conclusion that the person selected was more qualified or had superior credentials is unnecessarily vague. Without amplification and elaboration this conclusion will not satisfy a defendant's burden of articulating a legitimate, nondiscriminatory reason for an employment decision.[83] This type of statement does not fare much better than the clearly inadequate general denial of discriminatory motivation.[84]

Even if the employer is slightly more precise and states that it selected the incumbent over the plaintiff because of superior education and experience, the same vagueness defect surfaces.

"Education" is a term that can be reduced to objective norms. Therefore when making a hiring decision the employer should precisely define the education it deems controlling. Is it the number of years in school, the quality of the educational institution, the level of academic performance, or the major emphasis of the education that is crucial? The same could be said of experience. Is it the number of years, the relevance of past job duties, or the quality of the applicant's recommendations that is important in evaluating experience? Only if courts force defendants to articulate the precise elements of education and experience that were evaluated can plaintiffs be expected realistically to meet and refute defendants' evidence. Thus, a defendant's first obligation in articulating a comparison is to express as precisely and objectively as possible the elements that it actually evaluated in making the decision to select the incumbent over the plaintiff. General references to "superior education" or "better experience" do not satisfy that obligation.[85]

Since the burden falls on the defendant to establish the existence of the reason that it used to select a job candidate,[86] and since this evidence is more readily

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82. Watson v. National Linen Serv., 686 F.2d 877, 881 (11th Cir. 1982) ("The failure to establish 'fixed or reasonably objective standards and procedures for hiring' is a discriminatory practice."). For example, measuring a desirable quality of physical strength by a subjective "eyeball" conclusion that the plaintiff lacks physical ability is not legitimate. EEOC v. Spokane Concrete Prods., Inc., 534 F. Supp. 518, 523 (E.D. Wash. 1982). When possible, the employer is required to utilize objective tests that measure the desired physical qualities. Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984).

Even when subjectivity is unavoidable and therefore valid, the employer may be required to exercise that subjectivity with procedures that safeguard against conscious or unconscious prejudice. *See generally* Lewis v. NLRB, 750 F.2d 126 (5th Cir. 1985); Nath v. General Elec. Co., 438 F. Supp. 213 (E.D. Pa. 1977) (criteria, although subjective, clearly were job related and were clearly defined in terms of the competences to be measured); Casillas v. United States Navy, 735 F.2d 338 (9th Cir. 1984).

83. International Bhd. of Teamsters v. United States, 431 U.S. 324, 342–43 n.24 (1977) (general statements that employer hired the "best qualified applicants" insufficient to dispel prima facie case of systematic exclusion); Paxton v. Union Nat'l Bank, 688 F.2d 552, 569–72 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983) (general allegations that other employees were "better qualified" without supporting data is insufficient as a matter of law to carry defendant's burden in disparate treatment case); *accord* Uviedo v. Steves Sash & Door Co., 738 F.2d 1425, 1429–30 (5th Cir. 1984); White v. Vathally, 732 F.2d 1037 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 331 (1984); Lewis v. Smith, 731 F.2d 1535 (11th Cir. 1984); *cf.* Schwager v. Sun Oil Co., 591 F.2d 58, 61 (10th Cir. 1979) (Upheld discharge in which employee told that "he did not measure up to the standards. . . ."); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 961 (8th Cir. 1978) (Upheld district court finding that employer made a judgment that plaintiffs "were not the most competent, qualified persons to fill the available positions.").

84. International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.24 (1977).

85. Martinez v. El Paso County, 710 F.2d 1102 (5th Cir. 1983); Pittman v. Hattiesburg Mun. Separate School Dist., 644 F.2d 1071 (5th Cir. 1981).

86. *See supra* note 52 and accompanying text.

available to the defendant, the defendant also must demonstrate that the person chosen for the vacancy possessed the objective qualities that the defendant deemed controlling. If the person hired did not in fact possess the qualities that the defendant allegedly sought in making the decision, the defendant has not established the required reason. Absent a legitimate, nondiscriminatory reason, judgment cannot be awarded to the defendant.

To illustrate further, assume an employer asserts that the education relied on in selecting the male applicant over the female plaintiff was that the male had a physics degree from M.I.T. and three years work experience as a physicist in the Bell Telephone Laboratories. If the employer could show that when the decision to hire the male was made it believed that the male had those credentials, this would suggest education and experience did motivate the decision. However, if it appears that at the time the decision was made the employee did not have those credentials, or the employer was unaware of them,[87] a fact finder could not infer that the physics degree and Bell laboratory experience were the reasons that the incumbent was hired. Thus, the second step to satisfy the defendant's burden is to prove that the person selected had, or was thought to have had,[88] the credentials expressed by the defendant as controlling in its hiring decision.

If the employer supplies this second element of a comparative reason by proving that the person selected had the controlling credentials, this would appear to satisfy defendant's burden of establishing a legitimate reason for choosing the male incumbent. However, education and experience have meaning only when compared to the credentials possessed by the plaintiff. Thus, if the evidence discloses that the plaintiff also had a physics degree from M.I.T. and at least three years experience in a laboratory comparable to that of Bell Labs, the defendant's articulated reason of superior education and experience is rendered meaningless. An inference that the male was selected over the female because of his superior education and experience can only arise if the defendant establishes that, *under the objective criteria defined by the employer*, the education and experience of the male applicant was in fact superior to that of the female plaintiff. If the objective factors established by the employer reveal that the education and experience of the male incumbent and female plaintiff are virtually identical, the defendant has failed to establish the existence of the reason initially proffered for rejecting the plaintiff. In this case, the plaintiff's prima facie showing has not been placed in issue and plaintiff is entitled to prevail.[89]

Thus, to summarize, a defendant who articulates a comparison as its reason for the rejection of a qualified plaintiff must establish three factual elements: (1) the

87. *See, e.g.*, Baylor v. Jefferson County Bd. of Educ., 733 F.2d 1527, 1533 (11th Cir. 1984); Williams v. Trans World Airlines, 660 F.2d 1267, 1271–72 (8th Cir. 1981); Locke v. Kansas City Power & Light Co., 660 F.2d 359, 365–66 (8th Cir. 1981); Foster v. Simon, 467 F. Supp. 533, 537 (W.D.N.C. 1979).

88. Good faith belief in the existence of the reason, even if it is established later that the reason did not actually exist, can be a legitimate, nondiscriminatory ground for the employer's action. Establishing the belief that the reason existed carries an inference that such belief, rather than illegal considerations, motivated the employer's action. Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1186 (11th Cir. 1984); Garner v. St. Louis Southwestern R.R., 676 F.2d 1223 (8th Cir. 1982); DeAnda v. St. Joseph Hosp., 671 F.2d 850, 854 (5th Cir. 1982); Olafson v. Dade County School Bd., 651 F.2d 393 (5th Cir. 1981).

89. *See supra* notes 83–85 and accompanying text.

objective qualities that the employer deemed controlling; (2) the possession of those defined qualities by the person selected for the vacancy; and (3) the absence of those defined qualities in the plaintiff. If the defendant fails to establish these three components of a comparison to the satisfaction of the fact finder, then the defendant has failed to meet its burden of proving the existence of a legitimate reason. The plaintiff's inference of illegal motive remains unrefuted by any counter-inference, and the plaintiff is entitled to a judgment as a matter of law.

This burden on the defendant is not onerous. It properly recognizes the employer's right to establish the personal qualities it deems to be controlling in an employment decision. It only requires the defendant to define and articulate precisely those qualities. This requirement recognizes the plaintoff's need to raise the issue of the defendant's discriminatory motivation.

The proper balance of this approach is illustrated by applying it to an illustration of three "qualified"[90] applicants. Applicant A possesses a college degree, has no relevant experience, and is physically frail. Applicant B has not completed high school, but has many years of experience in the trade. B possesses excellent physical strength, but has a record of criminal offenses. Applicant C completed high school, has no experience in the trade but has many years of general work experience. C's strength appears average, and C has letters of recommendation from religious and civic leaders. Presented with these three candidates, the employer could have selected applicant A on the basis of college education, a quality not possessed by any other applicant. If the employer articulated that reason for its choice, it would have carried its initial burden by showing that applicant A possessed a college education, while the plaintiff did not. Alternatively, the employer could have selected applicant B based on superior strength and many years of relevant experience. By articulating and establishing those controlling factors, the employer would have carried its initial burden. Finally, the employer could have selected applicant C and legitimately given as its reason good moral standing, adequate strength, and a good balance between education and experience.

Ultimately, therefore, the employer would be free to select any of the three widely differing applicants. The strictures of Title VII thus have not unduly hampered the employer in exercising its management prerogatives. At the same time, however, the law would have forced the employer to be aware of and articulate the qualities that it deems controlling. This forced precision of articulation serves as an internal check on unconscious prejudices. More importantly, it permits present and future plaintiffs to analyze effectively the employer's use of that articulated reason. When courts force defendants to articulate the factors controlling their decisions, plaintiffs have an opportunity to attack the legitimacy of the reasons or to demonstrate their non-uniform and thus pretextual use.

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90. The applicants will be qualified if they possess the posted objective qualities the employer deems necessary for job performance. If no such qualifications are posted, a plaintiff will be qualified if she can perform the duties of the job. *See supra* text accompanying notes 58–69.

2. *Type II: Contextual Comparisons: Absolute Reasons and A Defendant's Inability to Establish a Reason's Legitimacy*

In *McDonald v. Santa Fe Trail Transportation Co.*[91] the Court established the necessity of assessing comparative treatment of the plaintiff when the context of the plaintiff's treatment prevents the articulated reason from supporting an inference of legal motivation. In *McDonald* two white employees and a black employee were involved in stealing company property. The black employee was retained, but the white employees were discharged. The court of appeals held that because the employer had "just cause" to dismiss all the employees involved in the theft, the white employees had not stated a claim of race discrimination.[92] The lower court thus held, in effect, that if there was a legitimate reason for the employer's treatment of the plaintiff, there was no need to evaluate and compare the misconduct of the other employees involved in the incident.

The Supreme Court reversed the circuit court's decision and held that notwithstanding the existence of a legitimate reason for the discharge of the white plaintiffs, once it appeared that equally guilty persons of a different race were treated differently, the employer had an obligation to give a rational explanation for the disparate treatment.[93] Absent such an explanation, the plaintiffs were entitled to prevail on their Title VII claim. Therefore, the assertion of an admittedly legitimate reason does not necessarily carry the defendant's evidentiary burden of production. When persons of a different class than the plaintiff are treated differently from the plaintiff even though they too possess the identical quality that the employer articulates as its reason for the plaintiff's treatment, the proffered quality does not support an inference that it, rather than proscribed criteria, motivated the employer's action. Thus, in *McDonald*, once it appeared that other employees of a different race were engaged in virtually identical misconduct but were treated differently, a fact finder could not infer that the reason given (theft) actually motivated the treatment of the plaintiffs.

Theft, fighting, absenteeism, or insubordination as the articulated reason for a plaintiff's treatment, does not necessarily require comparing the plaintiff's conduct or misconduct to that of other persons. Usually, noncomparative reasons tend to be legitimate since, once established, they will sustain an initial inference that the stated reason motivated the employer's action. However, if the plaintiff demonstrates that he also possesses the controlling quality or characteristic possessed by the favored employee and that the favored employee is of a different race, sex, age, or national origin, such evidence fatally undercuts any inference that possession of the initially articulated characteristic motivated the employer's action.[94]

Thus, if the defendant's articulated reason for its treatment of the plaintiff has

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91. 427 U.S. 273 (1976).

92. McDonald v. Santa Fe Trail Transp. Co., 513 F.2d 90 (5th Cir. 1975), *rev'd*, 427 U.S. 273 (1976).

93. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 (1976).

94. Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1186 (11th Cir. 1984); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1534 (11th Cir. 1984); Chescheir v. Liberty Mut. Ins. Co., 713 F.2d 1142 (5th Cir. 1983).

independent significance wholly apart from any comparison, the defendant has met its initial burden of going forward with the evidence.[95] The burden then shifts to the plaintiff to respond to the defendant's articulated reason. Other than adducing evidence suggesting the proffered reason was pretextual, the plaintiff can attack the defendant's reason by challenging its factual existence.[96] Alternatively, the plaintiff might present comparative evidence that does not challenge the factual existence of the reason, but undercuts its inference-bearing capacity by demonstrating that persons of another race possessed a similar quality and were not similarly treated. Either attack destroys the fact finder's ability to rule that the articulated reason could have motivated the employer's treatment of the plaintiff.[97]

Distinguishing between reasons that are inherently comparative and reasons that are noncomparative is important because the type of reason affects the parties' burdens of production and proof. If a reason is inherently comparative, the defendant must establish all aspects of the comparison as part of its burden to demonstrate the existence of a legitimate, nondiscriminatory reason for its actions. However, if the

95. Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984) (employer defendant's burden of going forward with the evidence satisfied by its articulation of a rule against tardiness and absenteeism, but trial court must evaluate the application of that rule to white employees); Becton v. Detroit Terminal Consol. Freightways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (arbitrator's finding of "just cause" for discharge satisfies the defendant's immediate burden of producing evidence, but the plaintiff is entitled to prove unequal application of the "just cause" rule).

96. *See supra* note 52.

97. Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984) (rule involving tardiness and absenteeism); Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (misuse of city property for personal reasons disciplined differently according to the race of the employee); Fadhl v. City and County of San Francisco, 741 F.2d 1163 (9th Cir. 1984) (differing standards of performance applied to men and women); King v. Trans World Airlines, 738 F.2d 255, 258 (8th Cir. 1984) (female but not male applicants asked interview questions concerning family plans); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1186 (11th Cir. 1984) (different rules against "moonlighting"); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984) (disparate application of an absenteeism rule along racial lines); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1534 (11th Cir. 1984) (black applicant asked questions on polygraph examination not asked of white applicants); Chescheir v. Liberty Mut. Ins. Co., 713 F.2d 1142 (5th Cir. 1983) (different rules against attending school while working applied to men and women); EEOC v. Brown & Root, Inc., 688 F.2d 338 (5th Cir. 1982) (female discharged for work defect tolerated in male employees). In each of these cases it is clear that each reason, standing naked of any comparison, would have been a legitimate reason for the employer's treatment of the plaintiff. However, when it was demonstrated that the same reason was not applied to persons of a different gender or race, the reason became illegitimate, and a judgment in favor of the plaintiff was compelled.

These contextual comparison situations, in which disparate application of a rule has been shown, have been analyzed by lower courts as plaintiff's prima facie case of discrimination. This prima facie case has elsewhere been defined as a four-part test:

> (1) That plaintiff was a member of a protected group; (2) that there was a company policy or practice concerning the activity for which he or she was discharged; (3) that nonminority employees either were given the benefit of a lenient company practice or were not held to compliance with a strict company policy; and (4) that the minority employee was disciplined either without the application of a lenient policy, or in conformity with the strict one.

Brown v. A.J. Gerrard Mfg. Co., 643 F.2d 273, 276 (5th Cir. 1981). *Accord* Chescheir v. Liberty Mut. Ins. Co., 713 F.2d 1142, 1148 (5th Cir. 1983); EEOC v. Brown & Root, Inc., 688 F.2d 338, 340–41 (5th Cir. 1982); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253 (8th Cir. 1981). Upon the plaintiff's prima facie showing, the defendant has the burden of articulating a legitimate nondiscriminatory reason for the disparate application of the rule. *See also* Moore v. City of Charlotte, 754 F.2d 1100, 1105–06 (4th Cir. 1985).

The result is the same whether the case is analyzed as a comparison creating a prima facie case of illegal discrimination, placing a burden on defendant to articulate a legitimate reason for the distinction, or as the plaintiff's comparison refuting the legitimacy of the defendant's articulated reason. Under either approach, defendant has the burden of doing more than resting on its articulated reason. Failure to present any additional evidence to challenge plaintiff's contextual comparative evidence will result in a judgment, as a matter of law, in favor of the plaintiff.

It seems preferable and simpler to analyze the situation within the parameters of *McDonnell Douglas* rather than creating two different standards for prima facie cases. The analysis suggested in this Article leaves *McDonnell Douglas* unchanged, and analyzes the plaintiff's comparison as a response to defendant's articulated reason, as a part of a shifting intermediate evidentiary burden.

employer proffers a noncomparative reason, its burden will be satisfied by presenting creditable evidence of the reason. The plaintiff must then carry an intermediate evidentiary burden of coming forward and presenting either evidence of the nonexistence of the reason or evidence of a comparative context that causes the reason to lose its legitimacy.

The key to identifying the distinction between inherently comparative reasons and reasons that are not necessarily comparative is to determine whether the reason articulated for plaintiff's treatment could sustain an inference of proper motivation without comparing the qualities favored employees might possess. If a reason has evidentiary significance wholly apart from the qualities of other persons it is noncomparative. So, when the plaintiff is rejected because she lacks a quality or credential the employer deemed necessary, this is a noncomparative reason. Typically, such reasons are proffered in discharges for rule infractions and in refusals to hire because the plaintiff was not deemed qualified. If a reason entails a reference to the qualities of other persons then it is comparative. Thus, when a plaintiff is not chosen because the employer selected a "better" or "more qualified" applicant, the decision necessarily compared the qualities of the plaintiff with those of the person hired. This situation arises most often in hiring and promotion situations, and where the employer is laying-off employees pursuant to a reduction of the work force.

Each fact pattern must be examined closely to determine the nature of the articulated reason. Seemingly minor shifts in the evidence can alter the nature of the defendant's reason, and with it, the nature of the parties' evidentiary burdens. An example will demonstrate the evolutionary nature of this type of evidence.

An Hispanic plaintiff is discharged and non-Hispanic workers are retained. The employer's reason is that the plaintiff's output was below average. The term "below average" has no meaning without comparing the plaintiff's output to that of other workers. Thus, the defendant's reason for discharging the plaintiff is inherently comparative. This conclusion obligates the defendant to establish what output is average and to demonstrate that the plaintiff failed to meet that average.[98]

Assume the defendant, rather than having articulated "below average output" as the reason for plaintiff's discharge, stated that plaintiff's output and job performance were inadequate. Although such an articulation is absolute and noncomparative it clearly fails to satisfy the defendant's evidentiary burden because it is too open, subjective, and vague. The employer must specify in detail how the plaintiff's job performance was lacking.[99] The employer could comply with this demand for specificity by pointing out that the plaintiff's output was below 100 units a day, a figure deemed to be the minimum acceptable output. Such a reason is absolute and noncomparative. It does not depend upon the qualities of any other person. Thus, once the employer establishes the norm and demonstrates that plaintiff's job performance fell below that norm, the defendant has carried its evidentiary burden of articulating a legitimate reason for the discharge. If, however, the plaintiff produces evidence

98. *See, e.g.*, Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977).

99. *See supra* notes 78–87 and accompanying text.

demonstrating that non-Hispanic workers who were retained consistently produced less than the alleged 100 unit minimum, the plaintiff's evidence would demonstrate that the articulated reason (inadequate output and performance) could not support an inference that the proffered reason motivated the employer's action.[100]

Such an analysis does not infringe employer prerogatives in establishing the reasons it deems to be significant in retaining or discharging employees. However, the analysis does encourage specificity in the formulation of employment decisions, so that the plaintiff can place the specifically articulated reason in a comparative context that may undercut the reason's legitimacy. Only if the employer is required to specifically define the noncomparative factor it deems controlling in an employment decision can the plaintiff use that precise, articulated reason to compare other successful and unsuccessful applicants, and determine if the reason was applied unevenly along proscribed race, gender, ethnic, or age lines. If defendants are not required to articulate precisely the reasons applied in hiring decisions, meaningful comparisons will be difficult, and plaintiffs' realistic chances of establishing discriminatory application of the reasons will be frustrated.

3. *Type III: Collateral Comparisons: Qualities that Differ From the "Reason"*

If the defendant has responded to a prima facie showing of discrimination by articulating a reason that is not inherently based on a comparison, the plaintiff may still present evidence that compares the plaintiff's overall qualities to those possessed by persons the employer favored. Unlike a challenge to the existence or legitimacy of a reason, evidence that advances and compares factors not overtly used by the defendant in making its choice is a comparison that is collateral to the reason. Evidence of the plaintiff's general superiority to the person selected does not suggest that the reason articulated does not in fact exist. Nor does a showing of general superiority necessarily destroy the capability of an otherwise legitimate reason to support an inference that the articulated reason actually motivated the employer. Rather, collateral-superiority evidence suggests that the reason articulated did not motivate the employer's action, but was advanced by the employer as a pretext to disguise illegal animus. Therefore, proof of collateral-superiority does not require a judgment for the plaintiff. Even if the fact finder believes the employer utilized bad judgment, and finds for reasons other than those articulated that the plaintiff was superior to the person selected for the job, it is not precluded from also finding that the employer was motivated by the reason it gave. In short, a collateral showing of general superiority does not necessarily prove that the reason proffered was not used.[101]

Distinguishing between collateral comparisons and comparisons that destroy the existence or legitimacy of the defendant's reason can create some confusion. This important distinction can be illustrated by reference to the facts surrounding *McDon-*

100. Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977).

101. *See supra* note 77.

nell Douglas v. Green.[102] Plaintiff Green, a black man, had engaged in an illegal, civil rights "stall-in" trespass on the employer's premises. This misconduct, the Court indicated, would be grounds for discharging or not hiring Green.[103] The reason (trespass) would satisfy the defendant's burden of articulating a legitimate, nondiscriminatory reason because it is capable of supporting an inference that the reason given actually motivated the adverse action. If no further evidence were presented, defendant would prevail.

Assume that the plaintiff in *McDonnell Douglas* established that a white employee participated in the same civil rights "stall-in" and unlike Green, the white employee was hired or was not disciplined. The plaintiff would have the burden of establishing the existence of these comparative facts. However, once the facts were shown to exist, the court would be faced with a situation indistinguishable from that in *McDonald v. Santa Fe Trail Transportation Co.*,[104] in which the black plaintiff was discharged while a white employee was retained in a situation involving substantially similar misconduct.

Thus, once the plaintiff shows the articulated reason (trespass) is applied unequally along racial lines, the initially articulated reason is placed in a comparative context, and the inference that trespass rather than the plaintiff's race motivated the employer's action is no longer compelling. By successfully placing an otherwise legitimate reason in a context involving other employees (a context that destroys the reason's inference-bearing capacity), the plaintiff places upon the defendant a burden of explaining in rational terms the reason for the disparate treatment. Failure to articulate a legitimate reason for apparently disparate treatment entitles plaintiff to a favorable judgment.[105]

Rather than proving that white workers had simultaneously engaged in the same misconduct (trespass) for which Green was discharged, assume that the plaintiff's evidence established that at different times and places one employee was involved in an assault on a co-worker, and another employee had been involved in a theft. Both of these employees were white and neither was discharged. The fact that other employees had been guilty of assault and theft does not suggest that plaintiff was not guilty of trespass. Thus, this evidence of comparative treatment in no way undermines the existence of the reason (trespass). Furthermore, the fact that the defendant has treated different types of misconduct more leniently than it treated Green's trespass does not necessarily prohibit a fact finder from drawing an inference that the employer was motivated by the trespass to discharge the plaintiff. The comparison actually made in this context relies upon characteristics or qualities not articulated by the defendant in justifying its decision. The comparison thus is collateral to the existence or the legitimacy of the articulated reason. This collateral comparative evidence does not necessarily destroy the inference that the trespass

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102. 411 U.S. 792 (1973).

103. *Id.* at 803 ("Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.").

104. 427 U.S. 273 (1976).

105. *See* Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984); Williams v. City of Montgomery, 742 F.2d 586 (11th Cir. 1984); Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 380 (1984).

could have motivated the employer; rather, it is probative to show that the articulated reason (trespass) was being used by the defendant as a pretext for discrimination.[106]

4. *Type IV: Inconsistent Application of the Articulated Reason*

Perhaps the most difficult distinction between collateral comparisons and context comparisons is found in situations in which the same reason or quality is compared, but in which the reason or quality is compared in different circumstances or time references. Again, the actual facts of *McDonnell Douglas* illustrate this point. The plaintiff, Green, who allegedly had been denied re-employment because of his "stall-in" trespass, proved that the employer had been confronted in the past with employee trespass which took place during economic strikes and collective bargaining. In each case when the strike ended all employees were granted reinstatement as a part of the settlement. The question was whether proof of the same reason (trespass), applied in a different time frame (past labor disputes), is a collateral comparison or a context comparison.

The appeals court, on remand, correctly treated this comparison as being collateral to the articulated reason.[107] The trespass by striking workers was part of concerted activity during an economic dispute between the employer and the collective bargaining representative. The reinstatement of those strikers, both black and white, was made to end the dispute and bring about a resumption of production. The misconduct by Green did not involve an economic dispute that was supported by the union or a majority of the employees. Reinstatement of Green was not necessary to end an economic strike and resume operations. Therefore, the past reinstatement of trespassing employees did not compel a conclusion that the trespass of the plaintiff was not the motive behind his rejection.

As a variation on the *McDonnell Douglas* facts, assume a white applicant is selected for a vacancy over a qualified black applicant, and the reason given by the employer is that the black applicant had a criminal conviction. If the plaintiff's evidence proves that in fact he has no criminal record, the factual existence of the reason (criminal record) would be challenged. If the plaintiff's evidence proves that the hired white applicant had a similar criminal record, the reason (criminal record) would be placed in a comparative context that would destroy the legitimacy of the reason—it could not be the criminal record that motivated the decision if the person selected had a record. However, if plaintiff's evidence demonstrates that he has superior physical strength and many years of experience in the field, and the plaintiff argues that because of the remoteness of the criminal conviction, he is overall super-

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106. *See* Anderson v. City of Bessemer City, 105 S. Ct. 1504 (1985); *see also* Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984) in which the misconduct of the black employee was believed to have been of a different nature than the misconduct of the white employee. The court stated: "[I]f an employer applies a rule differently to people it believes are differently situated, no discriminatory intent has been shown." *Id.* at 1186. *See also* Boner v. Board of Comm'rs of Little Rock Mun. Water Works, 674 F.2d 693 (8th Cir. 1982) (misconduct of two employees was not the same and this justified differential treatment). Green v. Armstrong Rubber Co., 612 F.2d 967 (5th Cir.), *cert. denied*, 449 U.S. 879 (1980) (discharged employee, unlike the other employee, used a weapon); Johnson v. Bendix Corp., 31 Empl. Prac. Dec. (CCH) ¶ 33,393 (W.D. Mo. 1983) (discharged employee was the aggressor).

107. Green v. McDonnell Douglas Corp., 528 F.2d 1102 (8th Cir. 1976).

ior to the white applicant, the plaintiff fails to attack the existence of the reason or its legitimacy. Plaintiff's argument is collateral to the criminal record reason. The argument suggests only that because employers would not generally reject superior applicants on the basis of a remote criminal conviction, the employer advanced the criminal conviction as a pretext for discrimination.

Assume further that the black plaintiff does not contest the facts that he has a criminal record and the white applicant does not have a record, but proves that some months prior to the decision in question the employer selected for a similar vacancy a white applicant with a criminal record. The problem raised in this hypothetical is how to analyze an employer's inconsistent application of a reason in prior employment decisions. Does the inconsistent application of an employment criterion establish the illegitimacy of the criterion, or is inconsistency merely evidence that in the present case the articulated criterion is a pretext? *McDonnell Douglas* indicates quite clearly that inconsistency in the application of an employment criterion is evidence of the existence of a pretext for discrimination.[108]

The fact that a person selected for a past vacancy possessed qualities similar to the qualities asserted as the reason for rejecting the plaintiff for a present vacancy does not establish the illegitimacy of such qualities as a basis for making the present decision. If the plaintiff has a criminal record and the incumbent does not, the articulation of the criminal record as the reason for making the particular selection supports an inference that the criminal record, rather than race, motivated the decision. Proof that white applicants had been selected in the past who possessed criminal records is strong probative evidence that the criminal-record reason is being used as a pretext. However, evidence that an applicant's criminal record was not a controlling factor in the employer's prior hiring decisions does not necessarily preclude a factual finding that the employer based its present decision to reject the plaintiff, and hire the applicant who filled the vacancy, on the plaintiff's criminal record.[109]

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108. "[R]espondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness . . . were nevertheless retained or rehired." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973). *McDonald v. Santa Fe Trail Transp. Co.* places a burden on employers to articulate differences for differential treatment only when the reason is not simultaneously applied to employees involved in the immediate employment decision. *See also* Mozee v. Jeffboat, Inc., 746 F.2d 365 (7th Cir. 1984); Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); Corley v. Jackson Police Dep't, 566 F.2d 994 (5th Cir. 1978).

109. The analytical confusion can be illustrated by three recent cases in which the employer used a nonuniformly applied reason to justify a discharge.

Williams v. City of Montgomery, 742 F.2d 586 (11th Cir. 1984), involved the defendant's failure to invoke the rule in past employment decisions, and the court improperly held that this lack of uniformity in application rendered the rule itself incapable of supporting an inference of legal motivation. Two white firefighters had been discharged pursuant to an established policy requiring discharge of employees who were convicted of felonies. These two employees appealed their dismissals to the city personnel board. The board ordered the two white firefighters reinstated. Three years later the plaintiff, a black firefighter, was dismissed for the commission of a felony similar to the one earlier committed by the white employees. The plaintiff appealed his dismissal to the personnel board, but unlike the white firefighters three years earlier, the board denied the plaintiff his requested reinstatement. In the Title VII suit, the trial court held that the plaintiff had established race discrimination as a matter of law because the personnel board had not articulated any rational reason for distinguishing between the plaintiff's situation and the situation of the white firefighters who had been reinstated some three years earlier. The court of appeals affirmed, apparently agreeing that the plaintiff was entitled to a judgment as a matter of law because the defendant had a burden of articulating a legitimate reason for the different treatment accorded the plaintiff.

V. COMPARING THE COMPARISONS: ILLUSTRATIONS FROM THE LEADING CASES

Phillips v. Martin Marietta Corp.[110] provides the inspiration to illustrate the four types of comparisons. In *Phillips* a female applicant was rejected by the employer for a job because she had pre-school-aged children. The plaintiff presented evidence that no inquiries about children were directed to male applicants who successfully applied for the position. This evidence showed the comparative context of the articulated reason and conclusively demonstrated that having pre-school-aged children was an important criterion in the employer's decision only when it applied to women. Thus, in this case, having pre-school-aged children could not be a legitimate reason for rejecting the plaintiff.[111]

The result reached in *Williams* would seem to be correct. The trial court certainly could conclude from all the facts that the treatment of the plaintiff was racially motivated, and such a finding should be affirmed in that it was not clearly erroneous. However, the court's rationale is faulty. When the defendant articulated the felony conviction as the reason for the discharge, this satisfied the defendant's burden of articulating a legitimate, nondiscriminatory reason. Evidence showing that three years earlier a similar reason had not been applied to white firefighters does not destroy the inference that when the employer made the decision affecting the plaintiff it was motivated by the plaintiff's criminal act. The evidence of dissimilar application of the no-felony rule is strong evidence of its current pretextual use, but this evidence should not entitle the plaintiff to a judgment as a matter of law. The clear teaching of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is that past dissimilar treatment is only evidence of pretext.

The court in Abasiekong v. City of Shelby, 744 F.2d 1055, (4th Cir. 1984), was confused about the proper application of McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). This court erroneously considered simultaneous disparate application of a rule along racial lines as mere evidence of pretext. In *Abasiekong* a black employee was discharged. The employer's evidence indicated that the plaintiff had used his employer's property for personal activity. The court correctly concluded that this was a legitimate, nondiscriminatory reason for the plaintiff's discharge which satisfied the defendant's immediate evidentiary burden. The plaintiff responded with evidence showing that a number of white employees were similarly using their employer's property for their personal reasons and that, unlike the black plaintiff, these white employees had not been disciplined. Although the court of appeals reversed a judgment notwithstanding the verdict rendered in favor of the plaintiff, the court reasoned that the evidence of simultaneous dissimilar application of the rule to current employees along racial lines was only evidence that the rule was being relied upon as a pretext for illegal racial motivation. The court was correct in its ultimate holding. Since evidence supported the jury verdict for the plaintiff, the judgment notwithstanding the verdict should have been reversed. However, the court should have concluded that the existence of the rule was incapable of supporting an inference that the employer was legally motivated, since the employer applied the rule to discharge a black employee, but not to discharge white employees.

Chescheir v. Liberty Mut. Ins. Co., 713 F.2d 1142 (5th Cir. 1983), illustrates the correct analysis of contextual comparisons. *Chescheir* involved the disparate application of a rule prohibiting employees from attending law school. Two female employees were discharged for violating the rule. The plaintiffs presented evidence that at the same time the rule was being invoked against them, a number of male employees were allowed to attend law school. They also presented evidence that at earlier times the rule had not been invoked against male employees. The court correctly recognized that simultaneously invoking an otherwise valid rule against female employees, while ignoring it in regard to male employees, placed a burden on the defendant to articulate a legitimate, nondiscriminatory reason for its differential application of the rule. Since the defendant failed to present such evidence, the court correctly ruled that the plaintiff was entitled to a judgment as a matter of law. Although the evidence of differential application of the rule to past employees is evidence of pretext, invoking the rule against females while males were simultaneously not subjected to the rule was more than evidence of pretext; it was a comparison that rendered the rule itself incapable of supporting an inference of legal motivation. *Accord* Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984) In *Muldrew*, a black employee discharged for absenteeism, proved that current white employees with equal or worse records had not been discharged. This proof placed a burden on the defendant to articulate reasons other than absenteeism for the discharge of the plaintiff. The defendant failed to make any such showing. Thus the plaintiff was entitled to have judgment affirmed. *See also* EEOC v. Brown & Root, Inc., 688 F.2d 338 (5th Cir. 1982) (female discharged for having acrophobia while current male employees with similar fear merely reassigned).

110. 400 U.S. 542 (1971).

111. This analysis was utilized in King v. Trans World Airlines, 738 F.2d 255 (8th Cir. 1984). The female plaintiff was asked questions about her children, child care arrangements, future child-bearing plans, and her relationship with a male employee. Male applicants were not asked similar questions. This was discriminatory treatment along gender lines which placed a burden on the employer to establish a legitimate nondiscriminatory reason for its interviewing technique. Absent such proof, discriminatory motive in the selection of the male applicant was assumed. The employer was then required to prove that it would not have selected the plaintiff even in the absence of the discriminatory questions. *Accord*

Assume, however, that all applicants, male and female, are quizzed about their children and child care arrangements, and that the plaintiff is the only applicant who has no satisfactory care arrangements for her young children. This reason, arguably, might be a legitimate reason for selecting a male applicant. However, assume the plaintiff presents evidence that the male selected had personal health problems that would probably cause a rate of absenteeism as great as that normally associated with employees who have young children in the home. The plaintiff thus argues that notwithstanding her obligation to her pre-school-aged child, she would have been as good an employement prospect as the male incumbent who had health problems. The evidence of the incumbent's health is collateral to the reason articulated (pre-school-aged children) for differentiating between the plaintiff and the incumbent in the selection process. It suggests the employer's articulated reason is a pretext for discrimination. Still, while the evidence might support a finding of illegal motive, it would not compel it.

Rather than presenting evidence of the male incumbent's health, assume the plaintiff demonstrates that at an earlier time a male that had pre-school-aged children was selected for a vacancy, and had no better arrangements for the children's care than the plaintiff had for her children. This evidence of past inconsistent application of the factor articulated by the defendant as a selection criterion is a collateral comparison. Although relevant to show the reason (pre-school-aged children) was a pretext, the comparison does not necessarily demonstrate that when choosing between the plaintiff and the male applicant to fill the current vacancy, the employer was motivated by gender and not the fact that the plaintiff had unattended young children.[112]

Furnco Construction Corp. v. Waters[113] supplies the basis for another illustration. In *Furnco* the employer rejected three qualified minority applicants. The reason articulated was that the three were walk-on applicants, and as a general practice, the employer would not consider applicants that were unknown to the job superintendent. The Supreme Court held that this was a legitimate reason for a hiring decision, notwithstanding the fact that the employer might have used more effective methods of employee selection resulting in a less discriminatory effect on the employment of minorities. The reason was legitimate because it was capable of supporting an inference that the employer rejected the plaintiffs because they were "walk-ons," and not because they were black.

Assume, however, that the plaintiffs prove that during the same time frame in which they were rejected, a number of non-minority persons with similar backgrounds were employed, and that these non-minority applicants were walk-on applicants unknown to the superintendent. This hypothetical situation is nothing more than an adaptation to a hiring situation of the discharge facts found in *McDonald v. Santa*

Fadhl v. City and County of San Francisco, 741 F.2d 1163 (9th Cir. 1984) (employer required differing standards of performance of men and women); Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984) (black plaintiff asked questions on a polygraph examination not asked of white applicants, and on the basis of these responses the plaintiff was denied employment).

112. *See supra* note 109.

113. 438 U.S. 567 (1978).

Fe Trail Transportation Co.[114] In *McDonald* a reason that was used to reject black applicants was not applied to white applicants. The minority and non-minority applicant both possessed the trait or quality that the employer deemed controlling in its rejection of the black applicant. In the hypothetical, the plaintiff's comparative evidence places the defendant's reason (walk-on) in a context that makes it incapable of supporting an inference that the reason (walk-on), rather than race, motivated the employer's action.[115] If the defendant has no reason to distinguish the plaintiff walk-ons who were rejected, and the white walk-ons who were accepted, then the plaintiffs are entitled to judgment.[116]

The plaintiffs might produce evidence showing that they have greater and more varied education and experience than the white employees who were selected. Such evidence does not compare the walk-on rule as applied to the plaintiffs and the persons who were favored. It compares qualities (education and experience) to the factor articulated by the employer as being controlling in the challenged decision. Thus, the comparison is collateral to the reason actually articulated. Even if the fact finder were to agree that the plaintiffs would have been a better selection than the successful applicants, this finding would not necessarily destroy an inference that the reason (walk-on) did motivate the employer at the time it made its decision to reject the plaintiffs. Evidence of collateral, general superiority is relevant, but only to show that the articulated reason might have been used as a pretext for discrimination.

If the plaintiffs prove that in a time frame significantly before or after their rejection the employer had indeed employed non-minority walk-on applicants, this disparate application of the same factor in a different time context should not render the reason as applied to the plaintiffs illigitimate. This is the rule of *McDonnell Douglas*. Plaintiff's proof would be only a collateral comparison. Thus, even though the employer was more willing at an earlier time to hire walk-on applicants, it does not necessarily follow that its reluctance to hire the plaintiffs because they were walk-ons is a pretext.[117]

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114. 427 U.S. 273 (1976).

115. *See, e.g.*, Fadhl v. City of San Francisco, 741 F.2d 1163 (9th Cir. 1984); Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984), which held that any factor used in making employment decisions, which is not uniformly applied to all race, ethnic, and gender groups, is not legitimate.

116. An employer might be able to explain the differential application of the criteria in neutral terms. For example, the defendant might explain that during the period the plaintiffs applied there was a surplus of applicants, and the supervisor rigidly applied the rule. However, when the white applicants were hired, there was a shortage of workers. Or, the defendant might explain that although white workers were hired even though they lacked the credential deemed controlling, the white workers had such outstanding credentials that an exception was made.

117. *See supra* note 109.

As a further illustration, assume that in selecting employees from a pool of qualified applicants the employer followed a practice of selecting employees on the basis of application dates—first to apply, first to be selected. *Furnco* teaches that such a practice is not illegitimate simply because other systems of selecting employees may be more effective. Furthermore, *Burdine* clearly holds that even if the plaintiff could prove that he or she is more qualified and would be a better employment prospect than the person selected, the "first-to-apply" rule would not be rendered illegitimate. If, however, the evidence indicates that the non-minority person who was hired applied at a date subsequent to the plaintiff's application then it would be impossible to infer that the "first-in-time" rule was the reason for the rejection of the plaintiff. Indeed, in the absence of any further explanation by the defendant, the only inference that could be drawn from these facts would be that the selection was made on the basis of proscribed criteria.

The "first-in-time" rule might appear to be an absolute, noncomparative reason. However, close examination reveals that the "first-in-time" concept is inherently comparative. It compares the time of the application of the two applicants and awards the job on the basis of that comparison. Thus, the employer would have the burden of showing that

The recent case of *United States Postal Service v. Aikens*[118] serves as a final illustration. The plaintiff, a black employee, was denied a promotion to a job vacancy. The reason articulated by the United States Postal Service for not promoting the plaintiff was that he had previously rejected lateral transfers that would have broadened his experience. The Supreme Court indicated that this reason was legitimate. The plaintiff presented evidence that overall, based on such factors as his seniority, education, and general experience, he was superior to the person ultimately selected. The Court correctly viewed this evidence of general superiority as evidence that the articulated reason (turning down transfers) was pretextual. Such evidence of overall superiority, however, did not compel a judgment for the plaintiff.

Now assume, the plaintiff proves that the person who received the promotion had turned down as many or more lateral transfers than the plaintiff. The evidence that both the plaintiff and the person favored by the defendant possessed precisely the same quality the defendant deemed to be controlling (turned down transfers) is more than evidence of a pretext. Such a comparison presented by the plaintiff would place the apparently legitimate reason (turned down transfers) in a context in which one could no longer infer the plaintiff's rejection was based on the defendant's proffered reason.[119]

Assume further, that the plaintiff's evidence proves that when other similar vacancies were being filled, other non-minority applicants who were promoted had turned down as many transfers as had the plaintiff. Thus, in other comparative selections, the employer did not rely on the same reason that it claimed controlled its decision in the plaintiff's case. This evidence does not compare the plaintiff with the other applicants for this particular vacancy. It does not necessarily prove that the plaintiff's relatively limited experience was not the decisive factor in his rejection. The evidence that turning down transfers had not been previously cited as a significant consideration is strong evidence of a pretext. However, it does not conclusively establish that the defendant did not utilize that factor in making this comparative evaluation of the applicants.[120]

Thus, when the plaintiff's proof compares factors not articulated by the employer to be controlling (seniority, education, general ability), such comparison is collateral and suggests the employer's reason is pretextual. Still, if the plaintiff's evidence proves that the employer articulated a controlling factor in the rejection of the plaintiff and did not cite the same controlling factor in other selection decisions made at different times, this proof does not necessarily establish the illegitimacy of the articulated factor in this particular comparative selection process. However, when plaintiff's proof isolates the very factor cited by defendant as being controlling, and demonstrates that in this particular selection process it was not uniformly applied to the applicants, then such an articulated factor cannot be a legitimate reason for the rejection of the plaintiff.

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the person selected applied before the plaintiff. The defendant's failure to carry this burden would warrant a judgment for the plaintiff.

118. 460 U.S. 711 (1982).

119. This is a contextual comparison controlled by McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). *See supra* notes 97–98 and accompanying text.

120. *See supra* text accompanying notes 108–109.

VI. Comparative Evidence and *Burdine* Clarification of the Confusion

Texas Department of Community Affairs v. Burdine,[121] is a confusing case because a superficial reading would indicate that the Court considered all forms of comparative evidence to be evidence of pretext. The Court indicated first that it was an error to require "the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff."[122] The Court continued:

> The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. *Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.* The fact that a court may think the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.[123]

This passage appears to lump together, without distinction, under the label "pretext," all evidence suggesting that the plaintiff was more qualified than the person selected. As pointed out above, some comparisons of the applicants' qualifications are inherently part of the defendant's reason for rejecting the plaintiff and must be established by the defendant. Other comparisons of qualifications are presented by plaintiff, but when established, destroy the legitimacy of defendant's articulated reason. Other comparisons, those that measure collateral qualities, do go to the ultimate issue of whether the employer's articulated hiring reason was a pretext.

In the emphasized sentence quoted above, the Court seems to suggest that if a comparison between the plaintiff and the person hired or retained indicated that their qualifications were the same, the defendant would have a burden of articulating lawful criteria for the rejection of the plaintiff. That sentence is a correct and consistent method of evaluating defendant's burden for making a final choice between two candidates who possess the same qualifications articulated by the employer as being controlling. If the employer engages in a comparison, and the comparison is thus the reason for the selection, the employer must articulate a lawful reason for rejecting the plaintiff. If the qualifications articulated by the defendant to be controlling are possessed in equal degrees by the plaintiff and the person favored, the defendant has discretion to choose between the persons, but the employer must articulate the basis for its selection. That seems clear from *Burdine*.

In the last sentence of the quoted passage, however, the Court appears to suggest that even if the trial court finds in the comparison between the plaintiff and the person hired that the plaintiff had superior qualifications, that showing of superiority is only evidence of a pretextual reason for discrimination. To reconcile these two, apparently contradictory sentences, the last sentence should be construed as addressing a situation of general collateral superiority. Thus if the person selected by the employer has qualities different from the qualifications actually articulated by the defendant as

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121. 450 U.S. 248 (1981).
122. *Id.* at 258.
123. *Id.* at 259 (emphasis added).

being controlling, and that because of these different qualities the plaintiff would have been a superior employee, this evidence of general collateral superiority should be relevant only to the issue of whether the employer's articulated reason was a pretext for discrimination.

The Court in *Burdine* emphasized that it did not want the courts to find a violation simply because a court might believe the employer "misjudged the qualifications."[124] The Court's statement correctly suggests that an employer's hiring criteria should not be re-evaluated in light of other factors that may show the plaintiff's general superiority. The Court's holding in *Burdine* does not suggest, necessarily, that when the plaintiff and the successful applicant have the same qualifications articulated by the employer as controlling its hiring decision, this showing goes only to whether the qualification is a pretext. Still, the Court makes it quite clear that the defendant fails to meet its evidentiary burden once it is shown that the plaintiff and the person favored are equally qualified when compared by the qualifications articulated by the employer itself as controlling its hiring decision.

In so interpreting *Burdine* it must be remembered that the Court was addressing a reason for rejecting the plaintiff that it found to be inherently legitimate in the absence of comparative evidence (personality conflicts).[125] The plaintiff did not contest the factual existence of this essentially noncomparative reason.[126] The plaintiff's evidence was largely that despite the personality conflicts, the plaintiff was generally superior to the employees retained. Thus, the plaintiff's evidence did not attack the legitimacy of the articulated reason by placing it in a context in which the reason (personality conflicts) could not support an inference that the reason motivated the employer's action.[127] The Court thus should be interpreted as responding to the factual pattern before it, saying in the last sentence of the above-quoted statement that when the plaintiff has presented evidence of collateral superiority, such evidence suggests only that the reason articulated was being used as a pretext for discrimination.

It must be remembered that the *Burdine* Court in no way attempted to distinguish or undercut the premises of *McDonald v. Santa Fe Trail Transportation Co.*[128]

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124. *Id.*

125. One could criticize *Burdine* for accepting as legitimate a reason that was suspiciously subjective. *See supra* notes 78–88 and accompanying text. Nevertheless, the reason is noncomparative. Defendant did not assert that plaintiff had more personality conflicts than the favored male employees. Nor did defendant assert that the male employees were favored because overall they were more qualified or superior to the plaintiff.

126. The plaintiff did not claim that she had no personality conflicts with key employees. Such a claim would have placed the existence of the reason in issue, and the defendant would have had to establish the existence of that reason. *See supra* note 52.

127. *See* United States Postal Serv. v. Aikens, 460 U.S. 711 (1982).

If the plaintiff had introduced evidence that the male employees selected had a record of personality conflicts substantially similar to the conflicts the plaintiff experienced, this evidence would have challenged the legitimacy of personality conflicts as the true reason. This would then present a situation similar to, and controlled by, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). The defendant would have been required to articulate a legitimate reason for the different treatment of similarly situated employees.

This illustrates why the Court should have been more reluctant to accept the vague, subjective reason, personality conflicts, as being legitimate without more precise identification of the conflicts the employer deemed to be significant. The statement "personality conflicts" is so imprecise that the plaintiff will find it quite difficult to present a comparison of the conflicts that the male employees might have suffered.

128. 427 U.S. 273 (1976).

McDonald clearly prohibited an employer from relying on a legitimate reason, when the comparative context of that reason indicated that it was not being uniformly applied. If contextual comparisons were deemed to be only evidence of a pretextual reason for discrimination and if the defendant had no burden to explain the incongruities in its treatment of the plaintiff, the Court would have had to overrule *McDonald* and reverse substantial lower court authority.[129] The fact that the *Burdine* Court did not do this suggests the *Burdine* and *McDonald* must be interpreted in a compatible manner.

Burdine addressed a collateral, noncomparative reason in which comparative evidence merely indicated that for reasons apart from the articulated factor used in making the selection, the plaintiff was more qualified than the persons retained. This collateral comparison is evidence of a pretext. *McDonald* addressed a noncomparative reason in which the very reason defendant articulated as being controlling was not applied to the other similarly situated employees. This comparative context did more than simply suggest the pretextual nature of the defendant's reason. It placed an affirmative burden on the defendant to articulate a reason for such disparate treatment. The failure of the defendant to explain the disparate application of the reason necessarily resulted in a judgment for the plaintiff. *Burdine* and *McDonald* should be construed in this manner.[130]

Finally, as discussed earlier, *McDonnell Douglas Corp. v. Green*[131] and *Furnco Construction Corp. v. Waters*,[132] should be interpreted in light of *Burdine* to impose on defendants the obligation to establish the objective, factual basis upon which any articulated comparison is made.[133]

VII. Conclusion

Confounded no doubt by the ambiguous decision in *Texas Department of Community Affairs v. Burdine*, the lower courts have been groping for a consistent and coherent analysis of employer comparisons. This confusion can be overcome by appreciating the differing nature of comparisons in light of the proper evidentiary burdens under the *McDonnell Douglas Corp. v. Green* model.

In establishing an initial inference of illegal motivation, the plaintiff need not prove comparable superiority over the person selected for the vacant position. If the plaintiff possessed the objective qualifications established by the employer, an inference of illegal motive can be drawn. The employer's burden is to articulate a

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129. *See supra* notes 97–98.

130. A similar analysis should be utilized in situations in which an inference of discriminatory motive is created by statistical proof, *see supra* notes 30–37, and the defendant attempts to justify its rejection of the individual plaintiff because of the alleged superior qualities of the person chosen. Defendant should be required to set forth the elements of the comparison in objective terms, and demonstrate that the person selected, but not the plaintiff, possessed those controlling qualities. If the reason for rejecting the individual plaintiff is noncomparative, the plaintiff should be allowed to present evidence that the person favored had the same quality or suffered from the same defect as the plaintiff. Such a presentation would preclude the articulated reason from serving as a basis for the rejection of the plaintiff. International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.24 (1977).

131. 411 U.S. 792 (1972).

132. 438 U.S. 567 (1978).

133. *See supra* note 52.

legitimate, nondiscriminatory reason to refute that inference. If the reason for rejecting the plaintiff was based upon an evaluation which compared the qualities of the plaintiff with the qualities of the person selected, it is the defendant's burden to articulate the basis of comparison.

The defendant's basic obligation is to establish the factual existence of an objective factor from which the fact finder could conclude that the articulated factor motivated the defendant's actions. The defendant has no general obligation to prove that the person favored over the plaintiff was more qualified than the plaintiff. However, if the defendant articulates a reason that is inherently based on a comparison of identified qualities possessed both by the plaintiff and the person favored, the defendant has a burden to articulate in objective terms the qualities it deemed to be controlling in making the selection, the possession of those qualities by the person selected, and the absence of those qualities in the plaintiff.

The defendant will have satisfied its immediate burden of producing evidence when the defendant establishes a reason that is legitimate, regardless of whether that reason is absolute or comparative. If the plaintiff fails to present any additional evidence, the defendant is entitled to a favorable judgment. The plaintiff, however, may produce evidence demonstrating that the noncomparative reason articulated by the defendant was not applied to the person who was favored over the plaintiff. This proof of comparative disparate application of the noncomparative reason precludes the articulated reason from supporting an inference that it motivated the defendant's treatment of the plaintiff. Absent any explanation of this disparate treatment, the plaintiff is entitled to a judgment.

Burdine teaches that evidence that the plaintiff made a comparison that utilizes factors other than the reason actually articulated by the defendant for hiring the successful applicant, evidence that suggests a general superiority of the plaintiff is evidence that the employer's reason is a pretext for discrimination. This evidence is probative, but it does not destroy the legitimacy of the reason articulated by the defendant. Proof of comparative superiority permits, but does not require, a judgment for the plaintiff.

If the reason relied upon by the defendant to reject the plaintiff was not consistently applied in past or subsequent employment decisions, this too is evidence of illegal motivation. Inconsistency in the application of a reason to decisions other than the one being challenged, does not, however, totally destroy the capacity of such a reason to support an inference that the reason motivated the decision in question. Consequently, evidence of inconsistent application of a reason requires a collateral comparison that may tend to establish the pretextual use of the reason. Inconsistency, like collateral superiority, will support a finding of illegal motivation, but it does not require such a finding.

This analysis of comparative evidence properly balances the employer's freedom to establish and define job qualifications, with the individual's need to challenge selections that appear to be in violation of statutory rights. Any greater burden on employers would involve the courts in a close evaluation of employer judgments, but any lesser burden would leave employer decisions largely beyond effective statutory challenge.